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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1678

MITZI S. BRIGGS,
Appellant,

vs.

STATE OF CALIFORNIA, etc.,
Appellee

Appeal from the Court of Appeal of California
First Appellate District, Division Two

JURISDICTIONAL STATEMENT

JESS S. JACKSON
180 Park Road
Burlingame, California 94010

GIDEON KANNER
1440 West Ninth Street
Los Angeles, California 90015
Attorneys for Appellant

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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JURISDICTIONAL STATEMENT

THE OPINION BELOW

The Opinion of the California Court of Appeal, First Appellate District, Division Two, is reported at 98 Cal. App.3d 190, 159 Cal.Rptr. 390.

JURISDICTION

1. This is a civil action in inverse condemnation brought by Appellant, Mrs. Mitzi S. Briggs, against the State of California, to recover just compensation for the *de facto* taking of her land for a state beach park and open space.

The cause was fully tried as to all issues on the merits. The trial court, sitting as a trier of fact without a jury heard evidence of *de facto* taking and precondemnation loss liability and thereupon made detailed and extensive findings of fact (Appendix E), determining that the state *totally* deprived Appellant of *all* her property rights in her land, and concluded that a *de facto* taking thereof occurred in March 1975 (Appendix F). Thereupon valuation was tried before a jury which awarded just compensation to which the trial court added compensation for pre-taking losses for inequitable precondemnation takings of all use and return, delay losses and attorneys' fees pursuant to a California statute.

On appeal, the California Court of Appeal reversed, holding that notwithstanding these findings, a taking of property did not occur as a matter of law, because the various State acts (starting in 1972 and found culminating in a full fee taking in March 1975) that *de facto* stripped Appellant of her property all occurred before the State Board of Public Works passed a resolution approving the acquisition of the subject property on September 27, 1976, and hence as a matter of law the State could not *de facto* "take" Appellant's property *no matter what it actually did and regardless of the total economic effect accomplished and intended.*

Additionally, the appellate court below held that as a matter of law Appellant could not recover just compensation for the *de facto* taking *in March 1975,* because her asserted sole remedy, despite the fact the State's intended taking accomplished total nonuse, was the pursuit of a writ of mandate seeking to invalidate the State's denials in

June and August, 1973 of permits necessary to use her land. The latter ruling was made on the authority of *Agins v. City of Tiburon,* 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979), probable jurisdiction noted, January 7, 1980, now pending before this Court as No. 79-602.*

2. The judgment of the California Court of Appeal was rendered on October 30, 1979. A timely petition for rehearing was denied on November 29, 1979, concurrently with modification of the opinion (the modified opinion appears in Appendix A). A timely petition for hearing was filed in the California Supreme Court. That Court extended the time in which to act on the Petition, and eventually denied it on January 24, 1980. A timely notice of Appeal to this Court was filed on March 20, 1980.

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*The appellate court inappropriately held *Agins* was controlling and totally ignored extensive trial court findings of fact that the "regulatory" acts in this case in large part were inspired by State motives to implement the public condemnation and use of Appellant's land. Alone and together with the State's precondemnation acts and delays they totally deprived Appellant of her property.

As contrasted to *Agins,* heard at oral argument, April 15, 1980, the Constitutional Fifth and Fourteenth Amendment issues are sharply and unequivocally presented to this Court in this case. This is not a pleading case, for all issues went to trial, uncontested evidence of no viable use, return, market and value was presented; trial court (liability and compensation for pretaking losses) decisions and jury (fee taking compensation) verdicts were rendered; Findings of Fact, Conclusions of Law and Judgment were entered. In *Agins,* the California courts precluded trial (by demurrer, the state equivalent of federal dismissal for failure to allege a claim). In this case Appellant did fully exhaust her "administrative" remedies (despite their total futility and idleness—considering that the State has continued its unrelenting course to acquire this property for public park use). In this case the State's acquisitory condemnation activity *still continues* and the State's tardy direct condemnation action was (and is) yet pending (e.g. see Finding of Fact 44(e), Exhibit E, p. A-42).

3. Jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1257(2).

Cases sustaining jurisdiction of this Court to review by appeal state court judgments concerning takings of private property without just compensation are:

Lake Country Estates Inc. v. Tahoe Regional Planning Agency, 436 U.S. 943 (1979);

Kaiser Aetna v. United States, ... U.S. ....., 100 S.Ct. 383 (1979);

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978);

Moore v. City of East Cleveland, 431 U.S. 494 (1977);

Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1977);

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Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926);

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

". . . nor shall private property be taken for public use, without just compensation,"

Fourteenth Amendment, United States Constitution:

"SECTION 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

The pertinent provisions of the California Property Acquisition Law on which the court below relied, as against Appellant's constitutional argument, California Government Code Sections 15850 et seq. These statutes appear in Appendix G.

The pertinent provisions of the California Coastal Zone Conservation Act of 1972 ("Proposition 20") adopted by initiative and legislatively amended in 1974, were the primary basis for the State's purported "regulatory" acts; see former California Public Resources Code Sections 27000 et seq.

QUESTIONS PRESENTED

1. Is it constitutionally permissible for a state court to hold unqualifiedly that payment of monetary just compensation provided by the Fifth and Fourteenth Amendments is *never* available as relief to an owner for total economic deprivation of property (loss of all use, return, market and value) caused by:

A. Regulations not motivated* or applied to the property to facilitate condemnation purposes?[1]

B. Regulations motivated or applied to the property not to further public health, safety and welfare but to facilitate condemnation purposes?

C. Inequitable precondemnation activities to abet public formal condemnation unreasonably delayed?

D. Regulations not motivated* or applied to the property to facilitate condemnation purposes but combined with inequitable precondemnation activities to abet public formal condemnation unreasonably delayed?

E. Regulations motivated or applied to the property not to further public health, safety and welfare but to facilitate condemnation purposes, and combined with inequitable precondemnation activities to abet public formal condemnation unreasonably delayed?

2. Where *regulatory* State activity preventing use of the subject property, *combined* with repeatedly announced and widely publicized State plans to condemn such ostensibly regulated[2] property for a state park, combined with other *precondemnation activity*, restraints and extensive *delay* in its filing of a formal condemnation action, separately substantially, and together totally cause and effect a *complete* destruction of that property's utility, return, marketability and value, leaving nothing in the nominal owner save only her obligation to continue paying property taxes on her now useless land:

A. has a taking of property occurred, within the meaning of the Fifth and Fourteenth Amendments, so as to entitle such owner to monetary just compensation?

B. It is constitutionally permissible for a State Court to declare under such precondemnation acts and effects that as a matter of law just compensation is never recoverable, no matter what the State actually does, and that the aggrieved owner may only seek the noncompensating *"remedy"* of judicial invalidation of the ostensible regulation, even though such regulation would not and could not *undo* said owners past losses, would be *futile* to prevent the State's condemnation and blight, and constituted only one substantial factor in the *de facto* taking effected by the combined, cumulative and intended impact of a host of State precondemnation activities?[3]

*This question *assumes* such regulation was purely motivated for valid public goals, i.e. valid land use concerns, as apparently assumed by the appellate court below, and not, as *found* by the trial court, applied as a device to aid condemnation by preserving the property in open space for public benefit pending condemnation at depressed values.

[1]This question is now pending before this Court on the merits in *Agins v. City of Tiburon*, No. 79-602.

[2]The regulation is properly characterized as ostensible because the trial court found on ample evidence that the State's denial of the permits necessary for Appellant's use of her land was ". . . pursuant to a policy to preserve the subject property in its then undeveloped status pending its acquisition." (Finding 56; see Appendix E, p. A-44).

[3]Please consider this Question in conjunction with Question 4, *infra*.

3. Where on a fully developed trial record containing a wealth of undisputed evidence, a trial court sitting as a trier of fact found *expressly* that State regulatory activities combined with simultaneous, avowed, widely publicized State plans and *precondemnation activities* aimed at public acquisition of the subject property, individually and together so impacted on that property as to preclude all viable economic use, return, sale and value, and have caused the owner to incur substantial losses and substantial delay in payment of just compensation, and where the *"regulatory" activities* were undertaken pursuant to a State *policy to preserve* the subject property in its open space undeveloped status pending its acquisition by the State:

A. Is such impact on the subject property (and the State's acts and policy in so acting) determinative of the question whether a taking within meaning of the Fifth and Fourteenth Amendments has occurred?

B. Is it constitutionally permissible for a State court to rule that such State activities and their impact on the subject property's value, utility and marketability may be wholly disregarded, and that notwithstanding these *factual* events, no taking occurred as a matter of law, because of the State's delay in following its own internal procedure whereby the State Board of Public Works is supposed to formally adopt an authorizing *resolution* before private land may be acquired for state parks, which here the Board delayed doing for an extended (and to an owner unreasonable) period of time?

4. Where a trial court found that a *de facto* taking (consisting of deprivation of *all* value, utility and marketability of the subject property) was effected by a continuous and extended course of governmental activity spanning a period of several years, but the course of governmental conduct included (as only one factor) the denial of a land use permit some 1½ years before the governmental activity became cumulatively so onerous as to give rise to a *de facto* taking, is it constitutionally permissible for a State court to rule that the aggrieved owner's sole "remedy" for such *de facto* taking is to have sued for non-monetary relief from the permit denial, some 1½ years before the *de facto* taking cause of action even *accrued* and particularly in the face of State legislative policy, declarations and assurances making such non-monetary "relief" an idle, wasteful and futile process?

5. Is it constitutionally permissible for a State court to hold unqualifiedly that the *only* remedy available to a landowner whose property has been *de facto* taken by the combined effect of numerous State activities (which included *as only one factor* the denial of a land use permit) is to seek *non-monetary relief* in the form of a writ of mandate invalidating the permit denial, even though such "relief" even if obtainable would be *wholly futile,* because the State thereupon could (*as it did here*) file an eminent domain action, thereby rendering such possible "relief" an idle act, and even though such "relief" could not undo the owner's losses?

6. On the facts at bench, where the trial court sitting as a trier of fact found on overwhelming and undisputed evidence that the subject property was completely *de facto*

taken by total deprivation of its utility, value, return and marketability, in pursuit of the State's policy to preserve the subject property as vacant land pending its eventual formal acquisition by the State, does the constitutional policy of fairness require that the ensuing economic burden of losses of return, value and of the property itself be borne by the benefitted public as a whole and not be disproportionately placed on such property's owner?

RAISING THE FEDERAL QUESTION

Appellant's complaint expressly alleged a taking of her private property for public use without just compensation, and deprivation of her property without due process of law, in violation of the Fifth and Fourteenth Amendments. The federal question was thus raised at the earliest possible time, and has been maintained throughout.

SPECIAL REQUEST FOR RELIEF

Aside from the important substantive issues of this controversy that amply warrant consideration on the merits, there is presented here an extraordinary situation. This case was disposed of below on the authority of *Agins v. City of Tiburon,* 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979) which is now pending before this Court.[4] Thus, should this Court eventually decide to reverse *Agins,* the legal rationale for the decision below will have been destroyed. Under such circumstances, it would be a needless

[4]*Agins v. City of Tiburon,* No. 79-602, probable jurisdiction noted, January 7, 1980.

and cruel miscarriage of justice for Appellant to suffer a loss on the supposed authority of the reversed state court decision.

Accordingly, the instant case amply warrants reversal and reinstatement of the trial court's judgment if this Court reverses *Agins,*[5] and as such warrants being held by the Court until such time as *Agins* is decided. Then, should the Court upon mature consideration decide to reverse *Agins,* the instant case could be disposed of summarily on the authority of this Court's decision in *Agins.* Thereby, Appellant would receive justified relief without further imposition on this Court's time and resources. Such a disposition would be both just and efficient.

However, should this Court not reverse *Agins,* this case also squarely presents distinct and additional constitutional issues. The facts and issues of this case go beyond the alleged total nonuse resulting from downzoning for public open space (and denial of fair hearing) raised in *Agins.* This case presents important constitutional issues concerning the misuses by a condemning agency of land use regulations with both interim and permanent confiscatory effects which cannot be undone. This case as well, raises questions as to inequitable precondemnation activities which totally strip an owner of all property rights.

[5]The Court's attention is invited to the fact that there is already before it another such case. A jurisdictional statement was filed at about the same time as *Agins,* in *San Diego G. & E. Co. v. City of San Diego,* No. 79-678, and the Court has not yet ruled on probable jurisdiction therein. *San Diego G. & E.* was also decided below on the authority of *Agins.*

STATEMENT OF THE FACTS OF THE CASE

Mrs. Mitzi S. Briggs (hereafter Appellant), acquired a vacant 35-acre oceanfront parcel of land between Point Lobos and Carmel, California, in 1963, intending to improve it with three homes to be integrated later into an executive-type resort and hotel. She had a $5,000,000 loan from Wells Fargo Bank, which was to be repaid from the proceeds. Appellant's efforts to implement her project began in 1968 when the three homes were designed; she obtained the necessary permits from Monterey County (in which the subject property is located) in October 1972. However, in the November 1972 election, a new law was adopted by initiative, creating a system of Coastal Commissions charged with development of a statewide coastal plan for land uses in the California Coastal Zone.[6] A misapplied, this "regulatory" act is one of the focal points of this action. The subject property lies in that zone and thus came within Commission jurisdiction.[7]

In early 1973, Appellant applied for a development permit, and for an exemption of her construction from the permit requirement. Her permit application received favorable recommendation from the Regional Commission staff which, *after initial consultation with the State De-*

[6]Please note that as of this writing—some eight years later—no such plan has been finally adopted. Also note one key function of said act was to recommend public acquisition of key parcels, including those (like the subject property) already planned for State acquisition.

[7]The Commission system is a two-tiered one. Applications for land use permits (required in addition to any local, city or county permits and zoning compliance) are made to Regional Commissions whose decisions may be appealed (by virtually anyone) to a single statewide Commission. The latter's appellate function is by a strange procedure deemed to be a *de novo* determination, even though the statewide Commission does not consider *de novo* evidence, and usually disposes of appeals in a matter of a few minutes.

partment of Parks and Recreation (hereafter Parks Department) executed a "Summary Report Form Permit" recommending issuance of the permit.[8]

However, one member of the Regional Commission took it upon herself to act dehors her office to frustrate Appellant's efforts. A few days before the Commission hearing on Appellant's permit, the Commissioner (Mrs. Gibson) telephoned the Director of the State Parks Department (Mr. Mott). As a result of this furtive, *ex parte* conversation Mott sent an *ex parte* telegram to the Commission. The telegram arrived at the Regional Commission on the eve of the hearing on Appellant's permit, and it was instrumental in cancellation of that hearing without notice to Appellant. Eventually, the telegram, as well as other Parks Department communications, were instrumental in the Commission's denial of the permit, for the "single and sole reason" (Finding 16, Appendix E, p. A-32) that the State "expressed an interest in acquiring the subject property." During the pertinent period of time (1973), denial was the fate of *all* development permits for properties on the State's acquisition list, i.e., whenever the State Department of Parks and Recreation showed an acquisitory "interest" in private land.

Altogether, there were four additional *ex parte* communications between the Commission and Parks Department personnel (one by letter and three by telephone)

[8]This document determined that Appellant's proposed land use (1) conformed to zoning; (2) would not have any substantial adverse environmental or ecological effect; (3) was consistent with the Coastal Act objective; (4) would have no significant effect on the environment; and (5) would not require a two-thirds Commission vote for approval because construction of three residences would have little effect on the area (Finding 8, Appendix E, p. A-29).

without notice to Appellant, all of which centered on the Department's desire to acquire the subject property and to keep Appellant from using it in the interim. As found by the trial court, such activities caused the denial of Appellant's permit in order to keep the subject property as "open space" until the State got around to condemning it (Finding 56, Appendix E, p. A-44).

Appellant then exhausted her administrative remedies by appealing the permit denial to the State Coastal Commission. Here again, the Parks Department made clear its intention to acquire the subject property[9] and, as found by the trial court, the appeal was denied substantially for that reason (Finding 25, Appendix E, p. A-34) even though other reasons were cited.

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[9]Much of the State's presentation below consisted of a semantic argument whereby it sought to distinguish between "intentions" and "plans". That argument consisted of asserting that the State can have no "intent" to acquire private property until it passes a formal resolution to that effect, and until this formality is attended to (which, of course, can be and in the case at bench was unilaterally withheld and delayed), there can be no "intent" to acquire, and so—goes the argument—no matter what the State actually does and no matter how it totally deprives a landowner of her property, there can be no taking because there was no formalized "intent" to take.

The trial court rejected this argument, but the California Court of Appeal accepted it, stating that "as a matter of law no action by the [Parks] Department alone could give rise to inverse condemnation liability" (Appendix A, p. A-20). In other words, what is before this Court for review is a holding that a State agency can *de facto* take private property without compensation (i.e., deprive its (former) owner of *all* rights and benefits of property ownership) but not be required to pay the *constitutionally* mandated just compensation because of the simple expedient of refraining from an internal controlled act of passing a resolution. This despite public officers repeated announcements and assurances of the state's intent to take, and specific public approval of the acquisition (the voters passed a bond issue allocating funds for purchase of the subject property, the legislature of the State appropriated these funds specifically for acquisition of this property and the Governor approved same).

Since the State's acquistory plans for the subject property were clear, undisputed and formed the clear basis for denial of Appellant's permit, any further pursuit of efforts to develop the subject property would have been an exercise in futility, because the State could at any time (*as it eventually did*) file a formal condemnation action, thereby rendering any judicial proceedings for non-monetary relief or new development plans wholly moot. The trial court accordingly found: "Since the State intended to acquire the subject property for public use, further attempts to privately develop the subject property would have been an idle act" (Finding 26, Appendix E, p. A-34).[10]

Appellant's decision not to pursue development of her land further was not only based on the evident futility of such a course in light of the State's imminent but tardy direct condemnation (which eventually did materialize), but also rested on repeated assurances given by State officials that her land would be expeditiously acquired. These included a letter from the Lieutenant Governor in

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[10]Please note that the doctrine of exhaustion of remedies is in California (as elsewhere) subject to the settled qualification that no one is required to pursue an idle endeavor (see *Ogo Associates v. City of Torrance* (1974), 37 Cal.App.3d 830, 112 Cal.Rptr. 761, and furthermore, in California such a determination of futility is deemed to be an issue of fact for the trial court (*People v. Superior Court (Tidwell)* (1979), 91 Cal.App.3d 95, 154 Cal.Rptr. 54, and see *Dahl v. City of Palo Alto*, 372 F.Supp. 647, 649. (N.D. Cal. 1974). Nonetheless, in spite of this record, the Court of Appeal completely disregarded the trial court's express finding and without any analysis of precedent or record whatever, asserted that Appellant's argument on this point was "spurious" (Appendix A, p. A-15). This curt, epithetical disposition of this important point was evidently based on the premise that under *Agins v. City of Tiburon, supra*, Appellant could not recover just compensation as a matter of law even if her land was *de facto* taken (Appendix A, p. A-14). Of course, *Agins*' soundness in that regard is now before this Court.

1973 (Finding 31, Appendix E, p. A-35), and assurances from Mott, the Director of the Parks Department in May 1974 (Findings 34 and 35, Appendix E, pp. A-36-37). It was in reliance on those representations that Appellant ceased further attempts to develop any economic use of her land[11] (Finding 37, Appendix E, p. A-37) in the property's condemnation-blighted condition.*

It cannot go without emphatic notice that the State offered not one iota of evidence to contradict, impeach, or rebut this wealth of economic testimony coming from eminently qualified witnesses, intimately familiar with the local real estate market. Accordingly, the trial court found (Findings 46-54, Appendix E, pp. A-42-43) that after May 1973, the subject property lost all economic use, return and/or marketability, and was *de facto* taken in March 1975. The findings were not contested on appeal.

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[11]The device by which Mott gave his assurances, was the representation that as soon as the voters adopted State Beach Park Recreation and Historical Facilities Bond Act of 1974, Appellant's property would be promptly acquired (Finding 34, Appendix E, p. A-36). On June 4, 1974 this Bond Act *was* adopted by the voters (Finding 38, Appendix E, p. A-37), and funds were appropriated by the legislature (and the Governor) to acquire the subject property, but no good faith attempt was made to acquire the subject property by purchase, and the condemnation action seeking to do so was not filed until some two years later, December 1976. In the meantime, as shown presently, *all* value, utility and marketability of the subject property were *totally* destroyed, leaving Appellant nothing except bare, nominal title (and even that subject to a *lis pendens* recorded by the State upon filing of its eminent domain action in 1976), and the dubious "privelege" of being obliged to pay mounting property taxes on utterly useless and unsaleable land.

*An attempted sale without disclosure of the State's "plans" would be a violation of the brokers' code of ethics and expose them as well as the seller to liability for misrepresentation (Finding 45, Appendix E, p. A-42).

The economic impact of the State's activities on the subject property was devastating to Appellant. Recall that she owed $5,000,000 to Wells Fargo Bank, and intended to use the proceeds of development of the subject property to repay that loan. Confronted with Wells Fargo's threat to call the loan as any economically viable use of the subject property began receding under the threat of condemnation into never-never land, Appellant set out to do what she could to salvage the situation and was forced to liquidate many of her assets.[12] However, it quickly became apparent that further pursuit of development would be an act of utter futility in light of the oncoming condemnation. The subject property had been stripped of all utility and value (Findings 46-54, Appendix E, pp. A-42-43), and *de facto* taken (Conclusion of Law), Appendix F, p. A-45).

As for the cumulative impact of the above State activities, the extensive publicity of the State's "plans" or "intent" to condemn the subject property, the passage of time, and their effect on the local real estate market, the evidence presented was overwhelming, clear and totally uncontradicted. It consisted of the testimony of Appellant's real estate lawyer and three highly experienced and knowledgeable local real estate brokers. All agreed that the State's announced and widely publicized intention to acquire the subject property for a beach park became com-

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[12]Evidence advanced before the trial court showed without contradiction that she suffered grievious losses; she was forced to sell other real estate holdings, and later a substantial part of her family inheritance in the form of Stauffer Chemical stock incurring large tax consequences. The full extent of those losses came out later at the post-trial hearing pertaining to valuation of delay losses. In short, Appellant was all but ruined. *The subject property is now in a tax sale status, with a lis pendens recorded against it.*

mon knowledge in the area following 1973, and as a result the subject property became unusable and unsaleable. It had no viable economic use, and there was no conceivable way in which it would generate *any* income or return. No broker would even list the subject property for sale, as there was nothing to sell.

In December 1976, 1¾ years after the subject property had been *de facto* taken (as determined by the trial court) the State finally filed its eminent domain proceedings. In the meantime, the instant [inverse condemnation] case was far advanced and went to trial first,[13] the trial court's findings on liability were filed on June 27, 1977, and its Judgment awarding just compensation was filed on March 30, 1978. Thereupon the State announced that it would not pay the judgment, and appealed.

By earlier stipulation, the sum of $1,750,000 was deposited into court for Appellant, even though the State's own appraiser was of the view that the value was higher (see Finding 42(1), Appendix E, p. A-41). That sum happened to be the amount the State had authorized to acquire the subject property (Finding 42, Appendix E, p. A-39)—a property which the jury found to be worth $3,900,000, *which value determination the State does not contest.*[14] Therefore, Appellant moved the trial court to set the

[13]Under California law, where direct and inverse condemnation actions are pending together, the one that goes to final judgment first and awards compensation, is deemed to be dispositive of both. *Klopping v. City of Whittier*, 8 Cal.3d 39, 104 Cal.Rptr. 1, 500 P.2d 1345 (1972).

[14]The State's appeal below was solely on the issue of inverse condemnation liability and delay damages (including interest rate). No error was asserted by the State as to valuation. Thus, under settled California law any claims of such error are deemed waived (see *Estate of Straisinger*, 247 Cal.App.2d 574, 578, fn. 1, 55 Cal. Rptr. 750, (1967) and authorities collected there).

eminent domain case for trial, so that she could receive just compensation for the now-admitted condemnation, and the trial court granted her motion. However, the State obtained a writ of prohibition from the California Court of Appeal (see Appendix A, p. A-10, fn. 5) staying that trial. Thus, Appellant was stripped of *all* value, utility, and marketability of her land back in 1975, but has been prevented from receiving full and just compensation in either the inverse or direct condemnation, prevented from meeting her financial obligations and rendered insolvent while soaring inflation is eroding her trial court award to a shadow.

Appellant now seeks relief from this Court. Since the question of whether a taking has occurred is a highly factual one, and here the trier of fact *found* a complete deprivation of all property rights in order to keep the subject property as "open space" until its formal acquisition could be accomplished, Appellant submits that a taking was established[15] and just compensation is called for.

INTRODUCTION

The case at bench presents this Court with a vexing and widespread constitutional problem that continues to generate large amounts of contentious litigation throughout the country, with results that, at best, vary drastically from state to state, even though the issue is one of *federal* constitutional dimension. The problem of so-called "con-

[15]In other words, this situation is the same as in *Nectow v. Cambridge*, 277 U.S. 183 (1928), where a trier of fact determined that the regulation destroyed the economic utility of the property, and was reversed by the Massachusetts Supreme Court. This court, in turn, reversed, holding that the determination by the trier of fact established a taking.

demnation blight" resulting from precondemnation activity and the inquiry of when such blight destroys constitutionally protected property rights so severely as to work a *de facto* taking, has resulted in a chaotic pattern of state and lower federal court decisions that are irreconcilable with one another, and in some cases with this Court's decisions.[16] Yet all these decisions purport to construe the same provisions of the Fifth and Fourteenth Amendments.

Moreover, this case confronts the Court with a shocking injustice that cries out for relief. As formally found by the trial court on overwhelming *and undisputed* evidence, Appellant was stripped of *all* value, utility and marketability of her land back in 1975. Yet, she was told below that she has no remedy whatsoever. Purporting to apply the California Supreme Court's decision in *Agins,* the court below ruled that Appellant could not seek just compensation when she was completely stripped of her property rights, because her supposed "remedy" was an action for nonmonetary relief, which—because of local procedural peculiarities—could only be brought some 1½ years before her cause of action even accrued, and which (as the court below conceded) she could not win. In short, the court below subordinated Appellant's federal constitutional rights to a bizarre local procedural anomaly, and thereby denied her any remedy whatever, in the process transforming her constitutional guarantee into a procedural game of the Catch-22 variety.

[16]As shown *infra,* several states' rules simply defy this Court's repeated interpretations of the Fifth Amendment's "just compensation" clause, as applied to blight situations where the market value of condemned land is depressed by advance announcements of local government intent to condemn. See *infra,* pp. 26.

THERE IS NO COHERENT LEGAL PRINCIPLE GOVERNING THE WIDESPREAD QUESTION OF WHEN INEQUITABLE GOVERNMENTAL PRECONDEMNATION ACTIVITIES EFFECT A DE FACTO TAKING OF PROPERTY SLATED FOR CONDEMNATION WHICH IS DELAYED WHILE SUCH PROPERTY IS BLIGHTED AND "REGULATED" INTO ECONOMIC OBLIVION

The "sword of Damocles" effect that afflicts private property slated for condemnation which is then delayed, is a familiar problem. See Nichols on Eminent Domain, Vol. 4, § 12.3151.[17] That problem has two manifestations, of which only one has received even a modicum of this Court's attention, while the other has gone without any definitive judicial oversight whatever, even though it is of widespread impact and of constitutional dimension.

The first and relatively easy manifestation of the problem, is the effect on values that follows announcements that specific properties are about to be condemned. This Court has dealt with that problem several times in the context of so-called project enhancement (i.e., values generally increasing in the area because of the desirable nature of the announcd public project—see *United States v. Miller,* 317 U.S. 369 (1943)); as well as in the context of precondemnation blight (i.e., values decreasing because of the undesirable nature of the project, or because the land slated for acquisition for either kind of project becomes shunned

[17]"It is one thing to have the sword of condemnation resting available but unpointed in the governmental sheath. It is another to have it suspended like that of Damocles directly above one's property." *Halpert v. Udall,* 231 F.Supp. 574, 579 (S.D. Fla. 1964), Choate, J., concurring, aff'd. per curiam 379 U.S. 645 (1965).

in the market—see *United States v. Virginia Electric P. Co.*, 365 U.S. 624, 625 (1961), *United States v. Reynolds*, 397 U.S. 14, 16 (1970)).

The principle is now settled that in neither situation may the fair market value awarded in condemnation proceedings—*if and when they come*[18] be distorted upwards or downwards by reason of the contemplated governmental acquisition, although it must be noted that even this relatively easy principle becomes so confused at times that several states simply ignore this Court's views and force their landowners to accept inadequate "just" compensation in the form of market values prevailing at the time of taking, even though such values are by then depressed by the market's reaction to the earlier announced coming of the condemnation.

Nor is the market's reaction alone the most serious problem. With depressing regularity condemning entities have tried to give the declining market a helping hand, and that is what this case is ultimately about. Such govern-

[18]A serious problem engendered by the delay is that some of the landowners, faced with departing tenants, loss of rents, loss of use, and inability to sell at anything resembling fair market value, while property carrying costs (taxes, insurance premiums, maintenance, etc.) go relentlessly on, are unable to hold out until the condemnation comes and face loss of their properties by foreclosure or tax sale (see, *Sayre v. United States*, 282 F. Supp. 175 (N.D. Ohio, 1967), *Klopping v. City of Whittier*, 8 Cal.3d 39, 104 Cal. Rptr. 1, 500 P. 2d 1345 (1972), *Conroy-Prugh Glass Co. v. Commonwealth*, 321 A. 2d 598 (Pa. 1974). Such owners have no choice but to seek inverse condemnation relief. Moreover, sometimes the announced condemnation plans may wreak havoc on the impacted property for years, but then the actual condemnation does not materialize, so that there is *no* opportunity to seek compensation, save only by inverse condemnation. See *Washington Market Enterprises, Inc. v. City of Trenton*, 343 A. 2d 408 (N.J. 1975), *Jones v. People*, 22 Cal.3d 144, 148 Cal.Rptr. 640, 583 P.2d 165 (1978), *Richmond Elks Club v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977). *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Claims 1970).

mental activities take a wide variety of forms ranging from the subtle to the outrageous.[19]

By far the most common method is to "regulate" the targeted property in advance of condemnation so as to lower its value. This can take the form of a building moratorium (see *Kirschke v. City of Houston*, 330 S.W.2d 629 (Tex. 1959), overruled in *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978)), denial of building permits (*Director of Highways v. Olrich*, 5 Ohio St. 70, 213 N.E.2d 823 (1966), either altogether, or on condition that the owner "dedicate" gratis land that the condemning entity wants to acquire from him (*Mid-Way Cabinet etc. Mfg. Co. v. County of San Joaquin*, 257 Cal.App.2d 181, 65 Cal. Rptr. 37 (1967)), oppressive zoning (*Kissinger v. City of Los Angeles*, 161 Cal.App.2d 454, 327 P.2d 10 (1958),[20] and on-again, off-again building code enforcement (*City of Cleveland v. Hurwitz, supra*, 19 Ohio Misc. 184, 249 N.E.2d 562).

In all such cases the ostensibly "regulating" would-be condemnor piously asserts that it is only exercising its lawful police power for the public good, while it reaps impermissible benefits to itself in several ways.

By denying to landowners (whose properties are slated for condemnation) the right to use and improve their land,

[19]In some areas of the Midwest the process of softening up the landowners for forthcoming acquisition of their property went so far as to withhold trash pickup and police protection from the targeted areas; *City of Cleveland v. Hurwitz*, 249 N.E.2d 562 (1969, Ohio Misc.). Also see *Amen v. City of Dearborn*, 363 F.Supp. 1267, rev'd on other grounds, 532 F.2d 554 (1967, 6th Cir.).

[20]Such precondemnation zoning schemes can at times get byzantine; see *United States v. Certain Lands in Truro etc.*, 476 F.Supp. 1031 (D. Mass. 1979).

the would-be condemnor guarantees itself a cheaper acquisition price because, obviously, land unapproved for higher use or improvement is cheaper. Moreover, such a condemnor (particularly in the case of large projects in populated areas, such as urban redevelopment or major urban highways) thus guarantees itself a windfall as many owners of such properties, who find themselves locked into nominal but economically unproductive "ownership" whereby they must pay taxes, insurance premiums and incur other carrying costs but derive no economic benefit, simply have no alternative but to sell at a distress price, with the condemnor as the only ready buyer.[21]

The foregoing problems, however, are only the tip of an iceberg. A far more difficult problem follows where the threatened condemnation fails to materialize or is delayed for an extensive period of time during which the affected landowners are precluded from using their land. This is a serious situation that often leads to foreclosures and tax sales (see e.g. *Sayre v. United States,* 282 F.Supp. 175 (N.D. Ohio 1967), *Klopping v. City of Whittier,* 8 Cal.3d 39, 104 Cal.Rptr. 1, 500 P.2d 1345 (1972), *Conroy-Prugh Glass Co. v. Commonwealth,* 321 A.2d 598 (Pa. 1974), *Macmor Mortgage Corp. v. Exchange Nat. Bank,* 332 N.E. 2d 740 (Ill. App. 1975)).

Such owners have no choice but to seek a remedy by inverse condemnation actions, on the theory that the pre-

[21]Obviously, few—if any—prospective private buyers in the market are willing to pay a fair price for property which is of limited utility (being slated for condemnation) and which is certain to carry a condemnation lawsuit with it. See the observations of the courts in *Madison Realty Co. v. City of Detroit,* 315 F.Supp. 367, 371 (E.D. Mich. 1970), and *Drakes Bay Land Co. v. United States,* 424 F.2d 574, 586[4] (Ct. Claims 1970)

condemnation activities and the market's reaction have together worked a *de facto* taking by effectively depriving them of their property. But whichever way the problem is presented to the courts (i.e., whether by inverse condemnation or by inquiry into the proper measures of just compensation for losses and takings in the direct condemnation (when and if it finally comes), the decisional pattern around the country is simply chaotic. Several wholly irreconcilable approaches (with variations) have emerged, each purporting to construe the "just compensation" clause of the Fifth Amendment.

At one end of the spectrum are the courts of several states, that for all practical purposes defy this Court,[22] and hold that the aggrieved landowner has absolutely no remedy in such cases and must suffer an award of "just" compensation depressed by condemnor's acts. See *Chicago v. Loitz,* 329 N.E.2d 208 (Ill. 1975), *Bakken v. Montana State Highway Comm.,* 382 P.2d 550 (Mont. 1963). Indiana too is in this camp, and has applied such rule under draconian circumstances: *City of Gary v. Ruberto,* 354 N.E. 2d 786 (Ind. App. 1976). So has Massachusetts: *Fram v. Boston,* 292 N.E.2d 356 (Mass. 1973).

Next comes Ohio which follows a rule approaching *Virginia Electric/Reynolds* (i.e., it does not permit the con-

[22]As noted *supra,* in *United States v. Virginia Electric Power Co.,* 365 U.S. 624, 625 (1961), and in *United States v. Reynolds,* 397 U.S. 14, 16 (1970), this Court was outspoken in making it clear that it is violative of the Fifth Amendment's just compensation guarantee for a condemning agency first to depress values and then to reap the benefit of condemning at such depressed values. As shown in the text, the courts of some states ignore that principle, and by rigid adherence to a statutory date of value permit condemnors to violate the *Virginia Electric/Reynolds* rule by depressing values before that date arrives.

demnor to condemn at self-depressed values), but does not permit the owners to recover any losses other than the value of the subject property *as it was* before the condemnor depressed it: *City of Cleveland v. Carcione,* 118 Ohio App. 525, 531, 19 N.E.2d 52, 55-56 (1963). While better than the confiscatory Illinois rule, *supra,* this approach too is grossly unfair to the owner in an inflationary economy; it pays him the value of his property as it was years before its taking.

Next comes a group of states which follow the so-called basic blight rule; i.e., they award just compensation in the direct condemnation (when it finally comes) as if the condemnor-caused depression in values did not occur. *State Road Dept. of Florida v. Chicone,* 158 So.2d 753 (Fla. 1963), *Congressional School of Aeronautics v. State Roads Comm'n,* 146 A.2d 558 (Md. 1958), *Uvodich v. Board of Regents,* 453 P.2d 229 (Ariz. App. 1969). This approach, of course, does not address the plight of landowners driven to the wall by the delay and unable to hold out (as against foreclosure, tax sale or distress sale) until the condemnation comes.

Wisconsin has an anomalous rule that does not fit readily into a spectrum. On the one hand, Wisconsin is quite liberal to the blighted condemnee when the direct condemnation finally comes (see *Luber v. Milwaukee County,* 47 Wis. 2d 271, 177 N.W.2d 380 (1970)—held: rents lost while the taken building stood empty awaiting condemnation are constitutionally recoverable in addition to the building's fair market value). Yet on the other hand, Wisconsin takes a harsh position toward the owner of condemnation-blighted land when after long delay he seeks to recover

in inverse condemnation (see *Howell Plaza, Inc. v. State Highway Commission,* 284 N.W.2d 887 (Wis., 1979) held: owner of land in the path of a highway should have developed it anyway, and not having done so, was not entitled to recovery).[23]

Next comes the states which follow the basic blight rule but also recognize the aggrieved owner's right to bring an inverse condemnation action when the governmental precondemnation activities so trench on his property rights as to work a *de facto* taking. The problem is that practically no two states agree on what constitutes a *de facto* taking within the meaning of the Fifth Amendment. New York spoke out early on this subject, and after some equivocation (see *City of Buffalo v. Geo. Irish Paper Co.,* 299 N.Y.S.2d 8 (App. Div. 1969)) articulated a rule dichotomizing between blight (i.e., precondemnation value decrease) and *de facto* taking: *City of Buffalo v. J.W. Clement Co.,* 28 N.Y.2d 241, 269 N.E.2d 895 (1971). The *Clement* approach has it that a *de facto* taking occurs only if there has been physical invasion or direct legal restraint on the owner's right of user. This approach creates a giant loophole in favor of the would-be condemnor who can thus blight property for indefinite periods of time with impunity; it gets to reap the windfall of distress sales, and as to those owners who can hold out until the condemnation comes, it never has to pay more than fair market value when it finally gets around to actually condemning. The

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[23]One can hardly imagine a more ill-advised ruling. Are we to understand that an owner who is solemnly told by state officials that his land is slated for imminent condemnation should go through the shockingly wasteful endeavor of improving it, only to have the state's bulldozers knock down the improvements (after paying for them) shortly after they are completed.

owners' interim losses and carrying costs go uncompensated. Not surprisingly, *Clement* evoked criticism and a mixed judicial response. Only Oklahoma (*Empire Construction, Inc. v. City of Tulsa,* 512 P.2d 119 (Okla. 1973)), and Colorado (*Lipson v. Colorado State Dept. of Highways,* 588 P.2d 390 (Colo. App. 1978)) have chosen to follow *Clement* unequivocally.

In sharp contrast with the latter two states, Oregon expressly took a different approach, and refused to follow *Clement* (see *Lincoln Loan Co. v. State,* 545 P.2d 105, 109-110 (Ore. 1976)), choosing instead a fairer standard of recovery.[24]

Similarly, the harsh limitations of the *Clement de facto* taking rule were found unacceptable by the courts of New Jersey (*Washington Market Enterprises, Inc. v. City of Trenton,* 343 A.2d 408 (N.J. 1975)), Connecticut (*Textron, Inc. v. Wood,* 355 A.2d 307 (Conn. 1974)), and Washington (*Lange v. State,* 547 P.2d 287 (Wash. 1976)).

Then there is California—unquestionably in a class by itself. For decades, California law on point was in a state of outright contradiction.[25] Then, in *Klopping v. City of Whittier,* 8 Cal.3d 39, 104 Cal.Rptr. 1, 500 P.2d 1345 (1972), the California Supreme Court clarified the law. *Klopping*

[24]Note that *Lincoln Loan* also expressely refuses to follow the Illinois *Loitz* rule (discussed *supra*), as well as the old Texas rule of *City of Houston v. Biggers,* 380 S.W.2d 700 (Tex. 1964); the latter case, however, is probably no longer authoritative even in Texas, in light of *City of Austin v. Teague,* 570 S.W.2d 389 (Tex. 1978).

[25]Compare *Atchison, Topeka & Santa Fe Ry. Co. v. Southern Pacific Co.,* 13 Cal.App.2d 505, 517, 57 P.2d 575 (1936), with *Buena Park School Dist. v. Metrim Corp.,* 176 Cal.App.2d 255. 258-259, 1 Cal.Rptr. 250 (1959).

(a) forbade precondemnation depression of values, and (b) recognized an inverse condemnation cause of action for unreasonable blighting and for *de facto* takings. This rule (as applied to inverse condemnation cases) was limited in *Selby Realty Co. v. City of San Buenaventura,* 10 Cal.3d 110, 109 Cal.Rptr. 799, 514 P.2d 111 (1973), to make clear that such right of action applies only to precondemnation activities, not general planning. The rule constricted from then on, with different California appellate courts choosing as if from an intellectual smorgasbord whether any given case is more like *Klopping* or more like *Selby.*[26]

The point of the preceding state law survey is that while all these courts purport to be construing the Fifth Amendment's prohibition against uncompensated takings, about the only thing one can agree with is that there is no agreement among them. The citizen of Illinois, for example, may as well be governed on this point by a foreign power, as compared with, say, a citizen of Oregon. Both these states profess to be construing the same provision of the *supreme, organic law,* yet, they *expressly* and diametrically disagree with one another as to what that organic law means.

Similar inconsistencies may be found in federal law. Although not as irreconcilable as in the case of state courts, federal court decisions in this field likewise are unclear. It

[26]Compare e.g. *Smith v. State,* 50 Cal.App.3d 529, 123 Cal.Rptr. 745 (1975), with *People v. Peninsula Enterprises, Inc.,* 91 Cal.App. 3d 332, 153 Cal.Rptr. 895 (1979), involving virtually identical facts concerning delay in highway condemnation; yet, *Smith* held that no inverse condemnation cause of action had been stated while *Peninsula Enterprises* awarded substantial damages in a direct condemnation case. But see *Stone v. City of Los Angeles,* 51 Cal.App. 3d 987, 124 Cal.Rptr. 822 (1975). Appellant submits that this confusion results from focusing solely upon the *nature* of the governmental act and goals, rather than upon the *effects* of governmental acts, regardless of their nature.

was in the federal courts that the seminal idea of seeking relief in inverse condemnation on a *de facto* taking theory first emerged: *Foster v. Detroit,* 254 F.Supp. 655 (E.D. Mich. 1966), aff'd 405 F.2d 138 (6th Cir. 1968). Since *Foster,* some federal courts have entertained such cases and have granted relief; see e.g., *Thomas W. Garland, Inc. v. St. Louis,* 596 F.2d 784 (8th Cir. 1979), *Richmond Elks Hall Assn. v. Richmond Redevelopment Agency,* 561 F.2d 1327 (9th Cir. 1977), *Haczela v. Bridgeport,* 299 F.Supp. 709 (D.Conn. 1969), *Sayre v. United States,* 282 F.Supp. 175 (N.D.Ohio 1967).[27] *Eleopoulos v. Richmond Redevelopment Agency,* 351 F.Supp. 62 (N.D. Cal. 1972), *Madison Realty Co. v. Detroit,* 315 F.Supp. 367 (E.D.Mich. 1970).

Other federal courts have taken a different position: *Southpark Square Ltd. v. City of Jackson,* 565 F.2d 388 (5th Cir. 1977), *Donohoe Construction Co. v. Montgomery County Council,* 567 F.2d 603, (4th Cir. 1977).[28]

The U.S. Court of Claims takes a different and somewhat more consistent approach. It has made it clear that where governmental ostensible regulation is used to facilitate planned condemnation, a *de facto* taking will be found: *Benenson v. United States,* 548 F.2d 939 (Ct.Cl. 1977),

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[27]Note however that *Sayre* eventually articulated the rule that inverse condemnation relief was not available in the federal courts for blighting activities impacting on peripheral properties that were *not* scheduled for condemnation. *Sayre v. Cleveland,* 493 F.2d 64 (6th Cir. 1974). Also see, *Woodland Market Realty Co. v. Cleveland,* 426 F.2d 955 (6th Cir. 1970).

[28]The juxtoposition of these two cases illustrates the confusion. While *Donohoe* holds that six-month delay in condemnation is not so unreasonable as to be actionable, *Southpark Square* seems to conclude (quite wrongly) that a city may use its police power to frustrate use of private property slated for condemnation.

Drakes Bay Land Co. v. United States, 424 F.2d 574 (Ct.Cl. 1970). On the other hand where the government's conduct is not acquisitory, and its involvement is solely a regulation, a finding of a taking may not be made; see *DeTom Enterprises, Inc. v. United States,* 552 F.2d 337 (Ct.Cl. 1977); but see *Bydlon v. United States,* 175 F.Supp. 891 (Ct.Cl. 1959).

In sum, federal courts do recognize the availability of an inverse condemnation right of action in cases of claimed *de facto* taking arising from precondemnation activities that cause a blighting of property slated for acquisition, but their rationale for affording or denying such relief on any given state of facts remains unclear.

This is an important, if neglected, area of constitutional law, that cries out for clarity and analytical intervention by the Court, which so far it has never had.

THE ISSUE OF PROPER REMEDIES IN CASES OF NON-PHYSICAL TAKINGS IS NOW BEFORE THIS COURT, AND THE CASE AT BAR PROVIDES AN ESPECIALLY VIRULENT VARIANT OF THE INJUSTICE THAT RESULTS FROM DENIAL OF THE JUST COMPENSATION REMEDY

The case on whose rationale the court below denied recovery of just compensation to Appellant is *Agins v. City of Tiburon,* 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979), probable jurisdiction noted, No. 79-602. In view of the fact that *Agins* is now before this Court on the merits, it would seem unnecessary to consume additional effort and space briefing the issue of remedies. The Court's attention is therefore respectfully invited to the following briefs in No. 79-602 in which the landowner's position is

briefed: Jurisdictional Statement, pp. 19-29, and Appellant's Brief, pp. 31-55.[29]

However, the facts at bench illustrate a variant of the *Agins* problem which goes beyond the basic remedial issue for "mere" total downzoning presented there. Here, it is no longer a case of invalidation vs. compensation, for here seeking anything but compensation would be both futile and absurd. This case is illustrative of the widespread problem in which an invalidation remedy is the height of futility. What conceivable good would it do to anyone to burden the judiciary with litigation ostensibly seeking the invalidation of an administrative act or the mandating of the issuance of a permit, when the "regulatory" entity (should it lose) can simply file a condemnation action (as it did at bench) and thereby expose the entire process for the useless exercise that it is?

Moreover, the case at bench adds another dimension to the inefficacy of invalidation as a remedy. The regulation that works a taking can *only* be invalidated—so said the California Supreme Court in *Agins* whose holding was then applied below to the case at bench. But here the *de facto* taking did not occur until March 1975 (see Appendix F, p. A-45), whereas the permit denial had to be challenged under state law in 1973 (as conceded by the Court below; see Appendix A, p. A-5). Thus, what is before this Court for review is a *reductio ad absurdum* extrapolation of *Agins* whereby a rigid insistence on the use of the invalidation "remedy" requires the aggrieved owner to sue to invalidate a precondemnation misapplication of a regulatory device which itself was confiscatory, all before

[29]The case at bench is discussed in Appellant's Brief, pp. 48-50.

the cause of action even accrues (i.e., here in order to satisfy the Court below Appellant would have had to sue for mandamus in 1973, 1½ years before her taking cause of action accrued).

CONCLUSION

This case provides this Court with a dramatic illustration of the extremes to which California has carried its unsound *Agins* rule, and provides an urgent reason for corrective action and sound constitutional guidance for all jurisdictions. Assuming that the lower Appellate Court properly classified the State's acts as purely regulatory, their effect was (alone) found confiscatory; thus the issues of *Agins* are clearly presented here.

But far beyond legitimate lands use regulation, the Trial Court below found *misuse* of facially regulatory devices to facilitate condemnation of Appellant's property. Such unmonitored socialization of private property without compensation for the benefit and enrichment of society as illustrated by this case not only has a "chilling effect" upon private incentive, productivity and our nation's economy, but it strikes at the heart of our citizens' individual liberties. What citizen dare speak or act against a government misuse of police powers if his property (representing his past liberty voluntarily conferred to society) is totally at risk?

Appellant does not question the purposes, goals and public uses of environmental legislation or public parks. This is not the issue here. Rather, Appellant respectfully urges such laudible ends do not justify unconscionable means and unconstitutional results.

Justice, constitutional soundness and the need for clear precedent compel consideration of the issues and relief in this case.

Mrs. Briggs prays that probable jurisdiction be noted or that pursuant to 28 U.S.C. § 2103, certiorari be granted.

April, 1980

Respectfully submitted,

JESS S. JACKSON
GIDEON KANNER
Attorneys for Appellant

(Appendices follow)

Appendices

Appendix A

Opinion of the Court of Appeal of California

[Civ. No. 44189. First Dist., Div. Two. Oct. 30, 1979.]

[As modified Nov. 29, 1979]

Mitzi S. Briggs, Plaintiff and Appellant, v.
The State of California ex rel. Department of
Parks and Recreation, Defendant and Appellant.

COUNSEL

Evelle J. Younger and George Deukmejian, Attorneys General, Robert L. Bergman and R. H. Connett, Assistant Attorneys General, Leonard M. Sperry, Jr., Christopher M. Ames and Richard C. Jacobs, Deputy Attorneys General, for Defendant and Appellant.

Jackson & Gughemetti, Jess S. Jackson, Jr., and Gideon Kanner for Plaintiff and Appellant.

OPINION

TAYLOR, P.J.—The State of California, acting by and through the Department of Parks and Recreation (Department) appeals from a judgment in inverse condemnation awarding damages in excess of the sum of $6,000,000 to the property owner, Briggs, contending that: 1) Briggs had no cause of action for damages for inverse condemnation as a result of the California Coastal Zone Conservation Commission's (State Commission) denial of a permit or the Department's manifestation of an interest in acquiring the property; 2) the findings are not supported by the record and do not support the judgment; and 3) in the alternative,

even if Briggs is entitled to damages for inverse condemnation, the amount awarded was excessive and an erroneous rate of prejudgment interest was applied; Briggs cross-appeals, contending that the court erred by limiting her post-judgment interest to 7 percent and failing to award her reasonably incurred litigation expenses pursuant to Code of Civil Procedure section 1036. We have concluded that the judgment must be reversed as it was predicated on the erroneous legal theory that Briggs had a cause of action for inverse condemnation; accordingly, the remaining contentions on appeal and the issues raised by the cross-appeal need not be addressed.

As we have concluded that the judgment was based on an error of law, we shall not set forth in detail the trial court's findings and conclusions.[1] We trace the factual and procedural history in the light of the evidence relevant to our discussion: Since 1963, Briggs owned the subject property, 35.6 acres of raw, undeveloped land on the coast in Monterey County (County). In October 1972, Briggs obtained building permits from the County for development of three small residential homes on the property. Prior to November 8, 1972, Briggs commenced construction on the property, including commencement of excavations for footings, and placements of concrete foundations. On March 19, 1973, she obtained two new permits for different and much larger houses upon cancellation of the earlier permits. On April 4, 1973, Briggs applied to the County for approval of a "Minor Subdivision" development on the subject property and stated in her application that the property would be

[1]Nor will we discuss the errors in the findings and conclusions or the insufficiency of the evidence unless pertinent to our disposition of the appeal.

used for three single family residences. The County approved Briggs' application on November 7, 1973.

On April 16, 1973, Briggs filed an application for a development permit with the Central Coast Regional Commission (hereafter Regional Commission) of the State Commission, seeking a development permit for the construction of three single family residences and accessory structures as approved by the County in March 1973; she also filed for an exemption for construction of the three residences.

On May 17, 1973, William Penn Mott, Jr., then Director of Parks and Recreation of the State of California, sent to Olney Smith, Executive Director of the Regional Commission, a telegram stating: "The California Department of Parks and Recreation considers the Briggs property desirable as an addition to the existing Carmel River State Beach property." On May 18, 1973, Milton Frincke, District Superintendent of the Department of Parks and Recreation, Operations Division, District 4, executed and sent a letter to Smith stating: "We are very concerned about the possibilities of a proposed large scale development on the Briggs property, adjacent to the Carmel River State Beach. This is immediately south of Carmel Meadows. When plans are proposed, we would like to comment."

On June 18, 1973, after a public hearing, the Regional Commission passed a resolution denying Briggs' application for a permit.[2]

[2]The court's findings placed undue emphasis on the procedures and decision of the Regional Commission. The proceedings before the State Commission, however, are de novo and completely nullify the former determinations of the Regional Commission (REA Enterprises v. California Coastal Zone Conservation Com., 52 Cal.App.3d 596, 612-613).

On August 8, 1973, the State Commission denied Briggs' application for a permit, for the following reasons, as stated in its staff recommendation: "1. *Open Space Use.* The parcel is one of two privately-owned coastal areas between Point Lobos and the mouth of the Carmel River. The California Department of Parks and Recreation considers the property desirable as an addition to the Carmel River State Beach property. *Although the State Parks Department does not have a definite commitment to purchase the property, there is clearly a need for preserving the Commission's planning options as to coastal parks in this area.* Because of the manner in which the 3 homes would be spaced along the ocean bluff, construction of the homes would foreclose the possibility of acquiring either all the ocean front property or acquiring only portions and allowing the rest to be developed.

"Even if the Commission's planning process were to determine the acquisition is not desirable, it is too early in the planning process to decide that development should proceed in the manner proposed by applicant. It might be preferable to require clustered development on the portion of the property adjoining an existing subdivision, with the remainder of the property left as open space, to maintain as much as possible of the scenic qualities of the property.

"2. *Inducement to Development.* Although the proposed project consists only of the construction of 3 large homes, the applicant's claim of exemption states that the total development will have 2 more stages, 1 of which is a subdivision application in operation and the second of which is a planned unit development currently in the si

[sic] stage. Once the 3 homes are built, the property will be foreclosed from any significant open space or recreational use along the ocean front, which will in turn on [sic] that the property will be committed to further development. The road servicing the three homes runs along almost the entire ocean frontage of the property and together with utility extensions would encourage further development" (emphasis partially added). Briggs filed no mandate action to challenge the decisions of the State Commission.[3]

On September 7, 1973, Joseph Bodovitz, Executive Director of the State Commission notified Briggs that her appeal on an application for an exemption had been denied because she had not obtained building permits for the projects for which she claimed vested rights prior to the effective date of the Act, and the expenditures made were not in reliance on the plans for which building permits had been issued prior to November 8, 1972.

On September 28, 1973, William Penn Mott, Jr., executed and sent a letter to Briggs stating, in part, "in reply to an inquiry from the Coastal Zone Conservation Commission this department [Parks and Recreation] informed the Commission that *it does have an interest* in acquiring your property in the Carmel area *and will take further steps* to do so *when funds are available for such purpose.*" (Emphasis added.) On October 31, 1973, Lt. Governor Ed

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[3]Pursuant to the then applicable provisions of former Public Resources Code section 27424, a petition for mandate had to be filed within 60 days after the State Commission's decision (see present Pub. Resources Code, § 30801). Her failure to do so renders the State Commission's decision immune from objections in a collateral proceeding (Stockton v. Department of Employment, 25 Cal.2d 264, 267-268; DeCelle v. City of Alameda, 221 Cal.App.2d 528, 535).

Reinecke executed and sent a letter to Briggs stating, in part, that he had been in contact with Mott and that the State of California was very much interested in purchasing the subject property.

On May 9, 1974, Briggs and her attorneys met with Mott and Les McCargo of the Department. At that time, Briggs and her attorneys advised Mott that the state's conduct had prevented development and viable use of the subject property, and caused financial and economic injuries to Briggs. Briggs and her attorneys further informed Mott that unless the state gave some assurances that the property will be directly condemned then she would have to commence an inverse condemnation action, among other legal remedies. Mott then assured Briggs that the Department had an interest in acquiring her property and that it was among the top properties in the state for public acquisition. Mott also indicated to Briggs that a condition[4] of the Department's acquisition of the property was passage by the California voters of the June bond issue (State Beach, Park Recreation and Historical Facilities Bond Act of 1974) and that if this bond measure passed, the state would promptly acquire the subject property.

On May 9, 1974, after the above meeting, Mott executed and delivered a letter drafted by Briggs' attorney to Briggs, stating that the Department "intends to acquire, by negotiation or condemnation, fee title to your property above referenced if the pending ballot measure authorizing the issuance of Bonds is passed by the electorate this June,

[4]The trial court's findings that the passage of the bond issue was the only condition to the state's acquisition and that all other steps were mere procedural formalities is not supported by the evidence.

1974. *In the event said bond issuance is approved,* the State Park and Recreation *will then adopt a resolution* authorizing said acquisition, and *we will commence appraisal procedures and we will negotiate with you* to acquire said property. . . . As we have previously stated, *we have been interested in acquiring this property for many years, but have been unable to do so for the sole reason that funds to acquire the same have been unavailable.* If the Bond issue passes, this property will be included for prompt acquisition inasmuch as sufficient funds will then be available when the bonds are marketed" (emphasis added).

On June 4, 1974, the California electorate passed the bond issue. Thereafter on July 12, 1974, the Department passed a resolution directing, pursuant to the State Beach, Park, Recreational and Historical Facilities Bond Act of 1974, a study of a project involving an addition to the Carmel River State Beach, recommended this project, subject to the procedures of the bond act, and such implementation as necessary by the Director of the Department.

On July 23, 1974, Mott executed and sent a memorandum to Norman B. Livermore, Secretary for Resources, that: 1) designated the Briggs' property within the acquisition program derived from the State Beach, Park, Recreational and Historical Facilities Bond Act of 1974; and 2) designated funds for acquisition of the Briggs' property; and 3) stated the "scope" of the project as "to insure the continued scenic beauty of this green space, provide public access to the public beach, and to tie together portions of the Carmel River State Beach separated by a physical barrier"; and 4) stated that the recommended future state development "would include hiking trails, scenic overlook

and possible picnic area development"; and 5) stated that the Briggs property "is presently threatened with residential development"; and 6) stated that "the outstanding scenic qualities of this parcel make it a desirable addition to the Carmel River State Beach, Point Lobos complex"; and 7) stated that the operational effectiveness of the park unit would be enhanced by merging the separated sections of Carmel River State Beach that then could be more effectively patrolled and a considerable time saving in maintenance; and 8) concluded "this property is threatened by development and should be preserved for public use. This property will add needed upland to an existing State Beach, supplying access to the beach and to scenic overlook areas."

On September 27, 1974, the Governor signed chapter 1484, Statutes of 1974, Item 410.7B(ii) authorizing $1,750,000 for acquisition of the Briggs property from the State Beach, Park, Recreation and Historical Facilities Fund of 1974. Subsequently, efforts were made to find a manageable method to meet the public prescriptive easement requirement of the statute. After several months of meetings to iron out the difficulties with the prescriptive easement investigation procedure, the Legislature changed the procedure, effective May 2, 1975.

After January 1, 1975, a change of administration occurred with the election of a new Governor and appointment of new Secretary of Resources and Director of Parks and Recreation. Acquisition projects then in progress were held in abeyance pending review by the Secretary of the Resources Agency.

In January, 1975, review of the Department's budget estimate for acquisition of the subject property was requested of the Real Estate Services Division of General Services. The acquisition request by the Department to the Department of General Services to commence acquisition procedures regarding the Briggs property was made in May 1975, after the passage of the legislation which changed the provisions regarding prescriptive easement investigations. After passage of this measure, the General Services Department began the implied dedications study of all the property provided for in the appropriations bill.

Briggs filed the instant inverse condemnation action on August 2, 1975.

On October 28, 1975, the prescriptive easement investigation as to the Briggs property was concluded. The state could not commence the appraisal phase of the acquisition until after the prescriptive easement investigation was concluded. In December 1975, a contract was signed for an independent appraisal of the subject property. The appraisal was originally scheduled for completion by May 1976, but the appraiser's trial schedule required an extension; the appraisal was delivered on June 16, 1976.

On August 30, 1976, the Public Works Board authorized the Department of General Services to negotiate for the property and approve an augmentation to the amount previously budgeted because the appraiser's value was higher than that previously budgeted. On September 27, 1976, the Public Works Board passed a resolution authorizing the acquisition of the subject property. On De-

cember 31, 1976, the state filed a direct condemnation action against the property.[5]

The court found that: After May 1973, the state's denial of Briggs' applications and acquisition activities: 1) caused the property to be unmarketable in the open market in relation to its fair market value, or otherwise, and to have no viable economic use or return in relation to its value, or otherwise; 2) blocked and prevented any higher use or return on the subject property or the proceeds from a fair market sale. The court also found that as a direct and proximate result of the state's assurances, representations and promises to acquire the subject property from and after May 1974, Briggs ceased further attempts to develop any economic use of her property and incurred substantial economic and financial losses and damages to her property, as well as delay in payment of just compensation, and that the State Commission's denial of Briggs' application for a development permit and exclusions were pursuant to a policy to preserve the subject property in its then undeveloped status pending its acquisitions.

The trial court concluded that on March 27, 1975, the state had accomplished a de facto taking of the Briggs property and that, therefore, she was entitled to receive the fair market value of the property as of that date, damages incurred between the denial of the permit on August 8, 1973, and the taking, on March 27, 1975, and interest from the date of taking. The valuation phase commenced

[5]In People v. Superior Court (Briggs), No. 44236, decided November 17, 1978, this court issued a peremptory writ of mandate staying the trial of the condemnation action until the final determination of the instant appeal.

on August 29, 1977, and the jury rendered a verdict of $3,900,000 as the fair market value of the property on March 27, 1975. Briggs' other claims for damages were bifurcated and tried by the court. On March 30, 1978, judgment was entered in favor of Briggs in the sum of $6,429,437, offset by the Department's previously deposited sum of $1,750,000, or a total of $4,679,437; this amount included the fair market value of the property ($3,900,000), damages of $469,300 for the 19-month period (Aug. 1973-March 1975) and over $1,000,000 in prejudgment interest. Briggs also recovered litigation expenses of $957,002, including attorney fees in the amount of $751,500. This appeal and Briggs' cross-appeal ensued.

As indicated above, the trial court found and concluded that as a result of the State Commissions denial of Briggs' application for a permit as a result of the Department's interest in, and intent to acquire, the property, the Department was liable to Briggs in inverse condemnation. The court's findings and conclusions are contrary to State of California v. Superior Court (Veta) 12 Cal.3d 237, and its progeny. In Veta, our Supreme Court considered a claim of inverse condemnation based on the denial of a permit application by the State Commission under the 1972 Act[6] and the allegation that the permit was denied in

[6]The California Coastal Zone Conservation Act of 1972 was enacted by the People of the State of California as an initiative measure on November 7, 1972. The Act declared the California Coastal Zone to be a "delicately balanced ecosystem" whose preservation and protection for present and succeeding generations was a matter of paramount concern to the state and nation (former Pub. Resources Code, § 27001).

The 1972 Act created the California Coastal Zone Conservation Commission and six regional commissions; it directed them to undertake whatever studies were necessary to determine the proper

order that the affected property would " 'remain undeveloped and devoted to, and held for, public use as open space land' " (p. 252). The court, at page 253, rejected the claim that such a denial amounted to a constitutional "damaging" of property, on the ground that the Coastal Act was only an interim measure designed "to assure that developments in the coastal zone are consistent with the objectives of the Act so that priceless coastal resources are not irreversibly committed to uses which would be inconsistent with the plan ultimately developed."

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planning principles and assumptions needed to ensure the conservation and protection of coastal zone resources. Based upon those studies, the Commissions were directed to develop and adopt a California Coastal Zone Conservation Plan for submission to the Legislature (former Pub. Resources Code, §§ 27200-27201; 27300-27304; 27320).

During the period necessary for preparation of the plan and consideration of it by the Legislature, the Commissions were granted broad regulatory controls over proposed developments within the permit area of the coastal zone. Any person who wished to develop property within the zone was required to obtain a permit from the appropriate Regional Commission; any determination by the Regional Commission was thereafter subject to de novo review on appeal by the State Commission. (Former Pub. Resources Code, §§ 27400, 27423.) The Commissions could approve such an application only if they found that the proposed development would not have a substantial adverse environmental or ecological effect, and would not be inconsistent with the policies and objectives of the Act (former Pub. Resources Code, §§ 27400, 27423, 27402).

The 1972 Act, by its own terms, expired on December 31, 1976 (former Pub. Resources Code, § 27650). Prior to that time, however, the Commissions had prepared the California Coastal Plan and had submitted it to the California Legislature. The Legislature found that the plan conformed to the requirements of the 1972 legislation (Pub. Resources Code, § 30002). The Legislature further concluded that some of the recommendations of the Commissions were appropriate for immediate implementation, that some of them required further study, and that other similar means were appropriate for implementation. The Legislature then enacted the California Coastal Act of 1976 (Pub. Resources Code, § 30000, et seq.).

Our Supreme Court noted that numerous cases had previously upheld the validity of temporary regulatory measures enacted to preserve the status quo pending adoption of a comprehensive land use plan, and that the 1972 Coastal Act was designed to accomplish a similar purpose. The court held that the State Commission's denial of a permit was indistinguishable from that involved in Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com., 11 Cal.App.3d 557. In Candlestick, this court (Division Four) upheld the validity of the denial of a permit to fill the San Francisco Bay, even though the complaint alleged that the property had been rendered completely valueless.

As this court recently indicated in People v. Superior Court (Tidwell) 91 Cal.App.3d 95, 108-109, since Veta, supra, a number of Courts of Appeal have held that the denial of a building permit during the preparation of the coastal zone plan does not amount to a taking of property for public use without compensation (Patterson v. Central Coast Regional Com., 58 Cal.App.3d 833; Davis v. California Coastal Zone Conservation Com., 57 Cal.App.3d 700; Reed v. California Coastal Zone Conservation Com., 55 Cal.App.3d 889; CEEED v. California Coastal Zone Conservation Com., 43 Cal.App.3d 306). In Patterson, supra, this court (Division Four) recognized, at page 849, that designation of coastal properties for priority acquisition that would then lead to the mobilization of funds and the decision whether or not to acquire the property so designated, was a " '. . . mandatory element of the forthcoming Coastal Zone Conservation Plan,' " and a legitimate exercise of the police power that did not amount to

inverse condemnation.[7] Here, the State Commission's denial of Briggs' permit was an exercise of the statutory mandate. The Department's expression of interest in acquiring the Briggs property when funds became available was, at most, a designation and assignment of priorities so that resources could be mobilized.

Recently, in Agins v. City of Tiburon, 24 Cal.3d 266, at pages 272-273, our Supreme Court discussed the reasons underlying its ruling in Veta, supra, and rejected a constitutional argument similar to that made by Briggs here. In doing so, our Supreme Court said, at page 272: "Plaintiffs contend that the limitations on the use of their land imposed by the ordinance constitute an unconstitutional 'taking of [plaintiffs'] property without payment of just compensation' for which an action in inverse condemnation will lie. Inherent in the contention is the argument that a local entity's exercise of its police power which, in a given case, may exceed constitutional limits is equivalent to the lawful taking of property by eminent domain thereby necessitating the payment of compensation. We are unable to accept this argument believing the preferable view to be that, while such governmental action is invalid because of its excess, remedy by way of damages in eminent domain is not thereby made available. This conclusion is supported by a leading authority (1 Nichols, Eminent Domain (3d rev. ed. 1976) Nature and Origin of Power, § 1.42(1), pp. 1-116 through 1-121). . . ."

[7]Even prior to the coastal legislation, the courts upheld against claims of inverse condemnation, temporary or interim measures restricting development while public entities considered the properties for purchase (Metro Realty v. County of El Dorado, 222 Cal.App.2d 508; Hunter v. Adams, 180 Cal.App.2d 511).

The court (at p. 273) also reiterated that the proper and sole remedy is administrative mandamus. As indicated above, Briggs failed to pursue this remedy. Her contention on appeal that her failure to do so would have been an idle act is spurious.

Briggs, however, contends that the trial court's ruling was correct, as the above authorities are distinguishable since in the instant case the Department indicated to the Regional and State Commissions that the property would be a desirable addition to the State Park System and this indication had a permanent effect of diminishing the value and development potential of her property. As indicated above, even if so, Briggs' remedy was by mandamus (City of Walnut Creek v. Leadership Housing Systems, Inc., 73 Cal.App.3d 611, 621). We think that the authorities cited above clearly indicate that it was constitutionally proper for the State Commission in denying Briggs' permit to rely on the Department's expression of interest in Briggs' property.

Briggs' contentions also ignore the fact that the State Commission's denial of her permit was based on grounds totally independent of the Department's interest in purchasing her property. The court so found and the record indicates that the State Commission's denial was also based on: 1) the need for preserving its planning options as to coastal parks, independent of the purchase; and 2) in the absence of acquisition to consider the effect of Briggs' entire plan on the development of the area. Both of these were proper and consistent with the statutory mandate of the "permanent protection" of the remaining

natural and scenic resources of the coastal area and preserving its amenities and aesthetic values (Pub. Resources Code, §§ 27001, 27302, 27402; Coastal Southwest Dev. Co. v. California Coastal Zone Conservation Com., 55 Cal.App.3d 525, 532-536). Coastal Southwest, at page 537, also approved the consideration of the cumulative and overall impact of separate phases of an overall project. The protection of open space by limiting private use was aptly explained as to the private operation of a country club and golf course by this court (Division One) in Friedman v. City of Fairfax, 81 Cal.App.3d 667, at page 677. "While a conceived objective of preserving a scenic, historical and singularly desirable open-space resource may result in conferring a public *benefit,* such an otherwise valid purpose and attendant result is not the equivalent of a public *use* requiring compensation."

Thus, pursuant to the holding of this court in City of Walnut Creek v. Leadership Housing Systems, supra, 73 Cal.App.3d, page 621, the permit denial was based on several independent reasons and, therefore, could not provide a basis for the inverse condemnation judgment. Nor is there any merit to Briggs' attempt to distinguish City of Walnut Creek, supra, on grounds that the State Commission's decision (unlike that of the City of Walnut Creek) was not based on an objectively ascertainable standard. In CEEED v. California Coastal Zone Conservation Com., supra, 43 Cal.App.3d, pages 325-327, the court compared the standards of a number of zoning ordinances with the 1972 Act and concluded that the standards under the Act were sufficient and dictated by the very nature of

the legislative goals which also required the vesting of considerable discretion in the State Commission.

Briggs also argues that liability was established, as the Department's expression of interest was a "substantial contributing cause" of the damage. Van Alstyne, however, concludes that one of the limitations of the "substantial contributing clause rule" is the exclusion of non-physical consequential damages (Van Alstyne, "Inverse Condemnation: Unintended Physical Damage," 20 Hastings L.J. 431, 434-435 et seq.).

The State Commission's denial of the permit for reasons independent of the Department's acquisitory interest are beyond attack, as indicated above in footnote 3, page 5, and do not, as a matter of law, support the trial court's conclusion of inverse condemnation.

Briggs further argues that her cause of action is supported by Klopping v. City of Whittier, 8 Cal.3d 39. In Klopping, the City of Whittier had actually initiated condemnation proceedings but then dismissed the action when it become involved in other litigation that jeopardized the funding for the property. The city's resolution authorizing the dismissal of the condemnation action simultaneously declared the city's firm intention to reinstitute the condemnation proceedings when and if the other litigation was terminated in the city's favor. Our Supreme Court held (at p. 52) that the property owner was entitled to maintain an inverse condemnation action if: 1) the public authority acted unreasonably in the precondemnation activities, either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unrea-

sonable conduct prior to condemnation; and 2) as a result of the public authority's action the property suffered a diminution of value. The court expressly indicated in footnote 5, at page 52: "Only in unusual circumstances would an announcement of intent to condemn constitute a de facto taking."

The general principles announced in Klopping, supra, were further defined and refined in Selby Realty Co. v. City of San Buenaventura, 10 Cal.3d 110. In rejecting an argument based on Klopping, substantially identical to that made by Briggs here, our Supreme Court said at pages 120-121: "The deleterious consequences of haphazard community growth in this state and the need to prevent further random development are evident to even the most casual observer. The Legislature has attempted to alleviate the problem by authorizing the adoption of long-range plans for orderly progress. Thus, it has provided not only for the adoption of general plans but also regional plans (§ 65060 et seq.), specific plans (§ 65450 et seq.), district plans (§ 66105 et seq.), and a comprehensive plan for the conservation of San Francisco Bay (§ 66650 et seq.). In addition, the voters recently passed an initiative measure providing the mechanism for adoption of plans to preserve and protect the state's coastline (Pub. Resources Code, § 27000 et seq.).

"If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land. We indulge in no

hyperbole to suggest that if every landowner whose property might be affected at some vague and distant future time by any of these legislatively permissible plans was entitled to bring an action in declaratory relief to obtain a judicial declaration as to the validity and potential effect of the plan upon his land, the courts of this state would be inundated with futile litigation. It is clear, under all the circumstances, that plaintiff has not stated a cause of action against the county defendants for either declaratory relief or inverse condemnation."

The trial court's finding that the State Commission's designation of the Briggs property for acquisition merely confirmed the state's pre-existing intent[8] to acquire the property contravenes the above quoted portion of Selby. Nor can the Department's indication of its interest in the Briggs property be equated with the "intent to condemn" that under unusual circumstances could constitute a de facto taking under Klopping, supra.

Pursuant to the applicable statutes, the Department was able only to express its interest in the Briggs property. It was required to proceed in accordance with the Property Acquisition Law (commencing with Gov. Code, § 15850), and could not consummate the purchase of any property with funds from the 1974 act, unless the property was also approved by the State Park and Recreation Commission (Pub. Resources Code, § 5096.88) and the Secretary for Resources (§§ 5096.90, 5096.91), and until the Legislature and Governor had approved an appropriation of funds

[8]The record indicates that the State Public Works condemnation resolution was not passed until three years after the State Commission's denial of the permit.

(§ 5096.91). Public Resources Code section 5096.94 also specifies that "Acquisition for the state park system by purchase or by eminent domain shall be under the Property Acquisition Law . . . notwithstanding any other provision of law." Government Code section 15855, subdivision (a) declared, so far as pertinent, that "the State Public Works Board is the only state agency that may exercise the power of eminent domain to acquire property needed by any state agency for any state purpose or function."[9]

Government Code section 15853 provides, so far as pertinent that "(b) Where moneys are appropriated . . . such moneys shall be expended in accordance with the provisions of this part, notwithstanding any other provisions of law." This provision clearly contemplates Public Works Board determination of the desirability of purchase, even *after* an appropriation is made. Thus, Government Code section 15860 explicitly states, so far as pertinent, that "Any appropriation for the acquisition of real property pursuant to this part may be expended for the payment of all costs and expenses, including . . . the fees and expenses of appraiser . . . necessarily incurred in the examination, *and the determination of the suitability of any real property to be acquired or under consideration for acquisition . . .*" (emphasis added). Thus, as a matter of law, at all times here pertinent, no action by the Department alone could give rise to inverse condemnation liability.

[9]We recognize that this provision became effective on July 1, 1976. The fact that prior thereto the Department had statutory authority to condemn property (former Gov. Code, § 54093) is of no significance as under the then applicable procedures, that authority could be exercised only pursuant to the Property Acquisition Law. Section 5096.94, quoted above, so stated. The then applicable provision of the Property Acquisition Act, former Government Code section 15855, then required a resolution by the Public Works Board.

Further, the trial court here made no findings concerning unreasonable precondemnation activity. Such findings are necessary before liability can be imposed on the basis of Klopping, supra, 8 Cal.3d 39 (Elgin Capital Corp. v. County of Santa Clara, 57 Cal.App.3d 687). In fact, the court could not have made such findings. The evidence, as a matter of law, establishes that there was no unreasonable period of delay between the passage of the condemnation resolution in September 1976 and the filing of the condemnation action on December 31, 1976. Code of Civil Procedure section 1245.60 requires the filing of the condemnation action within six months of the adoption of the resolution of necessity.

Briggs, however, also argues that the Department's activities in the context of the 1974 Bond Act constituted a de facto taking or justified damages under Klopping, supra. Identical contentions were rejected in Helix Land Co. v. City of San Diego, 82 Cal.App.3d 932, 945-948. In City of Walnut Creek v. Leadership Housing Systems, supra, 73 Cal.App.3d, page 623, this court concluded that the period of time necessary for the sale of bonds, the appraisal of the property, and negotiations with the landowner did not constitute unreasonable delay. In doing so, Justice Sims observed, at pages 622-623: "If calling a bond election and urging passage to secure funds for a public purpose constituted a taking, the agency so acting would be subject to suit whether or not the issue carried. The expression of political preference cannot be so burdened." The trial court found that the delay here was precisely for the time required for the passage and implementation of the 1974 Bond Act.

As we have concluded that there is no basis for liability in inverse condemnation, we need not reach the remaining issues raised by the appeal and those raised by the cross-appeal.

The judgment is reversed. Each party to bear its own costs on appeal.

Rouse, J. and Miller, J., concurred

Appendix B

ORDER DENYING REHEARING

In the Court of Appeal
of the
State of California

First Appellate District

Division Two

1 Civil No. 44189
(Sup. Ct. No. 71974)

Mitzi S. Briggs,
Plaintiff and Appellant,
vs.
State of California, acting by and through the Department of Parks and Recreation,
Defendant and Appellant.

[Filed Nov. 29, 1979]

The Court:

The petition for rehearing is denied.*

Dated: November 29, 1979

TAYLOR, P. J.
Presiding Justice

*This Order denying rehearing was made concurrently with the modification of the opinion to its present form.

Appendix C

ORDER DENYING HEARING

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

Jan. 24, 1980

I have this day filed Order

HEARING DENIED

In re: 1 Civ. No. 44189

Briggs

vs.

State of California

Respectfully,

G. E. BISHEL
Clerk

Appendix D

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1st Civil No. 44189

In the Court of Appeal
State of California

First Appellate District

Division Two

Mitzi S. Briggs,
Plaintiff, Respondent and
Cross-Appellant,

vs.

State of California, etc.,
Defendant, Appellant and
Cross-Respondent.

[Filed Mar. 20, 1980]

Notice is hereby given that Respondent and Cross-Appellant Mitzi S. Briggs, hereby appeals to the Supreme Court of the United States from the decision of the California Court of Appeal entered in this action on October 30, 1979, and as to which the California Supreme Court denied hearing on January 24, 1980.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

JESS S. JACKSON
GIDEON KANNER
By /s/ JESS S. JACKSON
Attorneys for Respondent and
Cross-Appellant, Mitzi S. Briggs

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF SAN MATEO

The undersigned, being duly sworn, deposes and says: I am employed in the County of San Mateo, California. I am over the age of eighteen years and not a party to the within entitled action. My business address is 180 Park Road, Burlingame California 94010. On March 17, 1980, I served the attached NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on the attorneys of record for Appellant and Cross-Respondent, State of California, in this action, by placing a true copy thereof enclosed in a sealed envelope with first-class postage thereon fully prepaid, in the United States mail at Burlingame, California, addressed as follows:

George Deukmejian, Attorney General
N. Gregory Taylor, Assistant Attorney General
Richard C. Jacobs, Deputy Attorney General
6000 State Building
San Francisco, CA 94102

MARCYL SEIDSCHER
Marcyl Seidscher

Subscribed and sworn to before
me this 17th day of March, 1980

PATRICIA ANN GOOD
Notary Public in and for said
County and State

[Seal]

Appendix E

FINDINGS OF FACT

Superior Court of the State of California
for the County of Monterey

NO. 71974

Mitzi S. Briggs,
Plaintiff,

vs.

State of California, acting by and through the Department of Parks and Recreation, et al.,
Defendants.

[Filed June 27, 1977]

1. Since July 22, 1963, plaintiff, Mitzi S. Briggs, (hereafter "Briggs") has been and now is the owner in fee simple of certain real property (hereafter "subject property") consisting of approximately 35.6 acres of raw undeveloped land located on the coast of the Pacific Ocean, in Monterey County, State of California, as more particularly described in Exhibit A to the Complaint herein.

2. At all times mentioned hereto, the State of California was and is a public governmental entity possessing the power of eminent domain and authorized to acquire private property for public use by negotiation, condemnation, and the exercise of eminent domain.

3. In October, 1972, Briggs obtained building permits (Nos. 23822, 23883, 23884 from the County of Monterey for development of three small residential homes on the subject property.

4. Soon after receipt of the building permits on October 30, 1972, and prior to November 8, 1972, Briggs commenced construction on the subject property, including commencement of excavations for footings, and placements of concrete foundations. On March 19, 1973, two new permits for different and much larger houses were issued upon cancellation of the earlier permits.

5. On April 4, 1973, Briggs applied to the County of Monterey for approval of a "Minor Subdivision" development on the subject property. The application stated that the property would be used for three single family residences.

6. On April 16, 1973, Briggs filed an application for development permit from the Central Coast Regional Commission (hereafter "Regional Commission") of the California Coastal Zone Conservation Commission (hereafter "State Commission"). Briggs' application before the Regional Commission requested a development permit for the construction of three (3) single family residences and accessory structures with rural standard residential service road and underground utilities and sanitary systems on the subject property as approved by the County of Monterey under the new building permits issued for two of the three houses on March 19, 1973, (Monterey County Building Permits No. 24115, 24156, for houses nos. 2 and 3).

7. In early 1973, Briggs filed for an exemption from the Regional Commission for construction of said three residences.

8. On May 7, 1973, Mr. Olney Smith, Executive Director of the Regional Commission executed a "Summary Report Form-Permit" related to the Briggs development permit application. That Summary Report recommended that Briggs proposed development (1) conformed to zoning; (2) would not have any substantial adverse environmental or ecological effect: (3) was consistent with the Coastal Act objective; (4) would have no significant effect on the environment; (5) would not require a two-thirds (2/3rds) vote for approval since construction of the three residences would have little effect on the area; a conclusion confirmed through discussions with officials of the State Department of Parks and Recreation. The Staff Report recommended that the Briggs development permit be granted.

9. For several years prior to 1971 the State of California Department of Parks and Recreation had been planning to acquire the subject property as necessary for public use, to wit, open space and Carmel Beach State Park expansion and development.

10. At some time after May 7, 1973, and prior to May 17, 1973, Mrs. Victoria Gibson, a then Commissioner of the Regional Commission, telephoned Mr. William Penn Mott, Jr., then Director, Parks and Recreation, State of California. The purpose of Mrs. Gibson's telephone call was to inquire as to whether the State of California Department of Parks and Recreation had any interest in acquiring the subject property, prior to considering Briggs' development

permit application. Mr. Mott stated that the State of California was interested in acquiring the Briggs property. Mr. Mott further volunteered to communicate that interest to the Regional Commission, and in particular Mr. Olney Smith, its Executive Director.

11. On May 17, 1973, Mr. William Penn Mott, Jr., then Director of the Parks and Recreation, State of California, sent a Western Union telegram to Mr. Olney Smith, Executive Director of the Regional Commission, which was received by that Regional Commission on May 21, 1973. The telegram stated "The California Department of Parks and Recreation considers the Briggs property desirable as an addition to the existing Carmel River State Beach property."

12. On May 18, 1973, Mr. Milton Frincke, District Superintendent of the Department of Parks and Recreation, Operations Division, District 4, executed and sent a letter to Mr. Olney Smith, Executive Director of the Regional Commission, which was received on May 21, 1973, which stated "We are very concerned about the possibilities of a proposed large scale development on the Briggs property, adjacent to the Carmel River State Beach. This is immediately south of Carmel Meadows. When plans are proposed, we would like to comment."

13. On June 13, 1973, Mr. Michael Miller, a member of the staff of the Regional Commission telephoned Mr. Harmon Rowe who was responsible for acquisitions at the Department of Parks and Recreation, to obtain confirmation of the State's intent to acquire the subject property as expressed in Mott's telegram. Mr. Rowe stated that he

had recommended to Mr. Mott that the Briggs' property be acquired, but that he would confirm this matter and telephone back. Later, that same day, Mr. Rowe telephoned back Mr. Miller and informed Mr. Miller that Mr. Mott had said that the property was desirable, that the effort was being made to budget the acquisition, and that the telegram was written confirmation of those facts.

14. On June 18, 1973, the public hearing on the Briggs' Development permit application was held, at which time Mr. Olney Smith, on behalf of the staff of the Regional Commission, recommended denial of the Briggs' application because of the State's interest in acquiring the subject property. The staff recommendation was announced prior to any public testimony regarding the Briggs' application.

15. On June 18, 1973, the Regional Commission passed Resolution No. 78-88 denying Briggs' development permit application for the following reasons:

WHEREAS, this commission finds that said development will have a substantial adverse environmental and ecological effect and is not consistent with the findings and declarations set forth in Public Resources Section 27001 and is not consistent with the objectives set forth in Public Resources Code Section 27302 in that:

> "(1) the site of the development forms a scenic and physical link between Point Lobos and Carmel Beach, which are property of the State of California, and (2) the site of the development is usable for public recreation and the state has expressed an interest in budgeting its acquisition as a priority item; and (3) permanent protection of the remaining natural and scenic resources of the coast zone will be of

permanent concern to the ultimate California Coastal Zone Conservation Plan."

16. The single and sole reason for the Regional Commission's denial of the Briggs' development permit was the State of California's expressed interest in acquiring the subject property.

17. On June 19, 1973, Mr. Olney Smith executed and sent a letter to Mr. Marvin Weiner, a lot owner in Carmel Meadows, a subdivision adjacent to the subject property, in which he stated that "the Commission denied the application for permit based upon the fact that the State Department of Parks and Recreation has indicated interest in the purchase of all or part of the property, which is a connecting physical and scenic link between the Carmel River Beach Park and Point Lobos."

18. On June 19, 1973, a newspaper article appeared in the Monterey Peninsula Herald which accurately quoted the agency staff of the State Department of Parks and Recreation as being interested in buying the subject property for a state park if voters approved a 1974 bond issue, and which accurately quoted Mr. Olney Smith as saying that the site forms a "scenic and physical link" between Point Lobos and Carmel and is a natural park resource.

19. On June 20, 1973, a newspaper article appeared in the San Francisco Examiner which accurately stated that the California Parks and Recreation had indicated its interest in acquiring the subject property.

20. On June 29, 1973, Briggs appealed to the State Commission, from the Regional Commission's denial of her development permit application.

21. On July 18, 1973, Mr. Kenneth Madsen, an attorney for Mrs. Briggs, met with Mr. Olney Smith who then stated to Mr. Madsen that the "sole reason" and "single factor" for the Regional Commission's denial of the Briggs' application was the May 17, 1973, telegram of Mr. Mott and the State's intent to acquire the subject property expressed therein, and that said expressed intent took the matter out of the hands of the Regional Commission. Mr. Olney Smith further stated to Mr. Madsen that Briggs' only remedy was inverse condemnation.

22. Prior to August 8, 1973, the staff of the State Commission prepared a document entitled "Appeal Summary" regarding the Briggs' development permit appeal. That "Appeal Summary" stated, inter alia, that "the property provides a physical and scenic link between Point Lobos State Reserve and Carmel River State Beach. The State has expressed interest in purchasing this property."

23. Prior to August 8, 1973, the staff of the State Commission prepared a document entitled "Staff Recommendation" regarding the Briggs' development permit appeal. That "Staff Recommendation" recommended denial of the Briggs' development permit, stating as its reason that: "1. Open Space Use. The parcel is one of two privately-owned coastal areas between Point Lobos and the mouth of the Carmel River. The California Department of Parks and Recreation considers the property desirable as an addition to the Carmel River State Beach property.

24. On August 8, 1973, the Coastal Commission denied Briggs' development permit appeal for the reasons stated in the "Staff Recommendation."

On September 7, 1973, Joseph Bodovitz, Executive Director of the State Commission notified Mrs. Briggs that her appeal on an application for an exemption had been denied because she had not obtained building permits for the projects for which she claimed vested rights prior to the effective date of the act, and the expenditures made were not in reliance on the plans for which building permits had been issued prior to November 8, 1972.

No mandate action was filed challenging the Commission's decisions.

25. The State of California Department of Parks and Recreation's expressed interest in acquiring the subject property for public use substantially contributed to the State Commission's denial of Briggs' development permit appeal.

26. Since the State intended to acquire the subject property for public use, further attempts to privately develop the subject property would have been an idle act.

27. On September 4, 1973, Mr. Milton Frincke, District Superintendent of the Department of Parks and Recreation, executed and sent a letter to Mr. William Mott which stated "We suggest you send a letter to both the Central Coastal Committee and the State Conservation Committee expressing a continued interest in the Briggs' property. I realize this is a repetition of your former statement but will assist us and local citizens in preserving this key area in open space and for possible future addition to the Carmel River State Beach."

28. On September 13, 1973, Mr. Mott executed and delivered a letter to the Regional Commission and Coastal

Commission which confirmed the Department of Parks and Recreation's continued interest in acquiring the subject property as an addition to the Carmel River State Beach subject to the availability of funds if the 1974 Bond Act passes.

29. On September 28, 1973, Mr. William Penn Mott, Jr., executed and sent a letter to Mrs. Briggs stating in part "in reply to an inquiry from the Coastal Zone Conservation Commission this department [Parks and Recreation] informed the Commission that it does have an interest in acquiring your property in the Carmel area and will take further steps to do so when funds are available for such purpose."

30. On November 7, 1973, the Monterey County Board of Supervisors approved a Briggs' Minor Subdivision Application for the subject property.

31. On October 31, 1973, Lt. Governor Ed Reinecke executed and sent a letter to Briggs, stating in part that he had been in contact with Mr. William Mott and that the State of California was very much interested in purchasing the subject property.

32. In 1973, 827 of 945 development permits and 52 of 83 exemption applications to the Regional Commission were approved.

33. In January, 1974, the Regional Commission filed and served a lawsuit against Briggs in the County of Monterey, action No. M6292, consisting of a Complaint for Injunction and Civil Remedies and Civil Penalties and related Notice of Pendency of Action and Summons. Said

suit sought, among other remedies, a preliminary and permanent injunction restraining Briggs from selling, leasing, renting or in any way transferring any title in fee or otherwise on those parcels of land created by the Briggs Minor Subdivision.

34. On May 9, 1974, Briggs and her attorney met with Mr. William Mott and Mr. Les McCargo of the State of California Department of Parks and Recreation. At that time Briggs and her attorneys advised Mr. Mott that the State of Caifornia's conduct had prevented development and viable use of the subject property, and caused financial and economic injuries to Mrs. Briggs. Briggs and her attorneys further informed Mr. Mott that unless the State of California gave some assurances that the property will be directly condemned then she would have to commence an inverse condemnation lawsuit against the State of California, among other legal remedies. Mr. Mott then assured Briggs that the State of California Department of Parks and Recreation had interest in acquiring the subject property for a number of years and that it was among the top properties in the State of California for public acquisition. Mr. Mott then assured, represented to and promised Briggs that the only condition to the State's acquisition of the subject property was passage by the California voters of the June bond issue (State Beach, Park Recreation and Historical Facilities Bond Act of 1974) and that if said Bond Act passed the State would promptly acquire the subject property and that all other procedural steps by the State would be mere formalities.

35. On May 9, 1974, after the meeting referred to above in No. 34, Mr. Mott executed and delivered a letter drafted

by Mrs. Briggs' attorneys to Mrs. Briggs which stated that "The State of California, Department of Parks and Recreation, intends to acquire, by negotiation or condemnation, fee title to your property above referenced if the pending ballot measure authorizing the issuance of Bonds is passed by the electorate this June, 1974. In the event said bond issuance is approved, the State Park and Recreation will then adopt a resolution authorizing said acquisition, and we will commence appraisal procedures and we will negotiate with you to acquire said property. . . . As we have previously stated, we have been interested in acquiring this property for many years, but have been unable to do so for the sole reason that funds to acquire the same have been unavailable. If the Bond issue passes, this property will be included for prompt acquisition inasmuch as sufficient funds will then be available when the bonds are marketed."

36. In reliance on the State's representations and promises of May 9, 1974, Briggs deferred commencement of legal proceedings for mandamus, inverse condemnation, declaratory relief and other relief against the State of California.

37. In reliance on the State's representations and promises of May 9, 1974, Briggs ceased further attempts to develop any economic use of the subject property.

38. On June 4, 1974, the California electorate passed the Bond issue referenced in Mr. Mott's letter to Briggs of May 9, 1974, known as the State Beach, Park, Recreational and Historical Facilities Bond Act of 1974.

39. On July 12, 1974, the State Park and Recreation Commission passed Resolution 74-93 stating: "Be it resolved that the State Park and Recreation Commission direct a study involving State funds under the State Beach, Park, Recreational and Historical Facilities Bond Act of 1974, of a project involving an addition to the Carmel River State Beach categorized under, "Inholdings and Additions to Existing State Park Units" and "Be it further resolved that the Commission recommends said project subject to the procedures of the Bond Act; also, subject to such implementation as is necessary by the Director of Parks and Recreation.

40. On July 23, 1974, Mr. William Mott executed and sent a memorandum to Mr. Norman B. Livermore, Secretary for Resources, State of California, which: (1) designated the Briggs' property within the acquisition program derived from the State Beach, Park, Recreational and Historical Facilities Bond Act of 1974; and (2) designated funds for acquisition of the Briggs' property and (3) stated the "scope" of the project as "to insure the continued scenic beauty of this green space, provide public access to the public beach, and to tie together portions of the Carmel River State Beach separated by a physical barrier;" and (4) stated that the recommended future State development "would include hiking trails, scenic overlook and possible picnic area development;" and (5) Stated that the Briggs property "is presently threatened with residential development" and (6) stated that "the outstanding scenic qualities of this parcel make it a desirable addition to the Carmel River State Beach, Point Lobos complex" and (7) stated that the operational effectiveness of the park unit would

be enhanced by merging the separated sections of Carmel River State Beach. The result would be more effectively patrolled and a considerable time savings in maintenance and concluded (8) "this property is threatened by development and should be preserved for public use. This property will add needed upland to an existing State Beach, supplying access to the beach and to scenic overlook areas."

41. On July 24, 1974, a newspaper article appeared in the Monterey Peninsula Herald which accurately quoted Mr. Frank Bechler, administrative aide to Mr. William Mott, that calling for the study of the subject property was tantamount to including Briggs' property among the acquisition projects to be funded by the 1974 Bond Act, and that State officials had made a commitment to purchase Briggs' property.

42. On September 27, 1974, the Governor signed Chapter 1484, Statutes of 1974, Item 410.7B(ii) authorizing $1,750,000.00 for acquisition of the subject property from the State Beach, Park, Recreation and Historical Facilities Fund of 1974. Subsequently:

a) Efforts were made to find a manageable method with which to accomplish the prescriptive easement requirement.

b) After January 1, 1975, a change of administration occurred with the election of a new Governor and appointment of new Secretary of Resources and Director of Parks and Recreation. Acquisition projects then in progress were held in abeyance pending review by Secretary of the Resources Agency.

c) In January of 1975, review of the Department of Parks and Recreation's budget estimate for acquisition of the subject property was requested of Real Estate Services Division of General Services.

d) After several months of meetings to iron out the difficulties with the prescriptive easement investigation procedure, the legislature changed the procedure, effective May 2, 1975.

e) The acquisition request by the Department of Parks and Recreation to the Department of General Services to commence acquisition procedures regarding the Briggs' property was made in May, 1975, after the passage of the legislation which changed the provisions regarding prescriptive easement investigations.

f) Upon passage of the bill modifying the prescriptive easement investigation procedures, the General Services Department began the implied dedications study of all the property provided for in the appropriations bill as well as all previous projects augmented by Chapter 1521, Stats. 1974.

g) The plaintiff's inverse condemnation action was filed on August 2, 1975.

h) On October 28, 1975, the prescriptive easement investigation as to the Briggs' property was concluded. The State could not commence the appraisal phase of the acquisition until after the prescriptive easement investigation was concluded.

i) In December of 1975, a contract was signed for an independent appraisal of the subject property.

j) The appraisal was originally scheduled for completion by May, 1976.

k) Due to the appraiser's trial schedule, an extension was granted to July 1976. That appraisal was actually delivered on June 16, 1976.

l) On August 30, 1976, the Public Works Board authorized the Department of General Services to negotiate for the property and approve an augmentation to the amount previously budgeted, because the appraiser's value was higher than that previously budgeted.

43. Since at least May, 1973, the State of California Department of Parks and Recreation has intended to acquire the subject property for public purposes.

44. The State's earlier intent to acquire the subject property was confirmed and ratified by subsequent conduct and statements by the following, among other things:

(a) On June 4, 1974, the 1974 Park Bond Act was approved by the California electorate. In December, 1975, the State Commission published a document entitled "California Coastal Plan, California Coastal Zone Conservation Commission" which designated (at pp. 344-345) Briggs' subject property for acquisition and stated as to said property, "Acquire this 35.6 acres undeveloped meadow as an addition to Carmel River State Beach."

(b) In March, 1976, the State of California published a document entitled "Recommended Coastal Property for Public Acquisition," which indicated (at page 27 and Map 10) the Briggs' subject property for acquisition by the

State of California as a "buffer, view protection for Pt. Lobos Reserve" and further indicated an amount for preliminary funding in the sum of $1,500,000.00 already existing in Department of Parks and Recreation funds.

(c) The State of California obtained an appraisal dated June 16, 1976, on the subject property.

(d) On September 27, 1976, the State of California Public Works Board passed a resolution authorizing the acquisition of the subject property.

(e) On or about December 31, 1976, the State of California filed a direct condemnation action against the subject property.

45. At all times relevant hereto Mrs. Briggs and any listing broker of the subject property would be required to fully inform a prospective purchaser of all material facts affecting the subject property, including the State of California's statements and conduct related thereto.

46. After May, 1973, the State's denials of Briggs' applications caused the subject property to be unmarketable in the open market in relation to its fair market value, or otherwise.

47. After May, 1973, the State's acquisition activities caused the subject property to be unmarketable in the open market in relation to its fair market value, or otherwise.

48. After May, 1973, the State's denials of Briggs' applications and acquisition activities caused the subject property to be unmarketable in the open market in relation to its fair market value, or otherwise.

49. After May, 1973, the State's denials of Briggs' applications caused the subject property to have no viable economic use or return, in relation to its value, or otherwise.

50. After May, 1973, the State's acquisition activities caused the subject property to have no viable economic use or return, in relation to its value, or otherwise.

51. After May, 1973, the State's denials of Briggs' application and acquisition activities caused the subject property to have no viable economic use or return, in relation to its value, or otherwise.

52. After May, 1973, the State's denials of Briggs' applications blocked and prevented any higher use or return on the subject property or the proceeds from a fair market sale thereof.

53. After May, 1973, the State's acquisition activities blocked and prevented any higher use or return on the subject property or the proceeds from a fair market sale thereof.

54. After May, 1973, the State's denials of Briggs' applications and acquisition activities blocked and prevented any higher use or return on the subject property or the proceeds from a fair market sale thereof.

55. As a direct and proximate result of the State's assurances, representations and promises to acquire the subject property from and after May, 1974, Briggs has incurred substantial economic and financial losses and damages to the subject property, and delay in payment of just compensation therefor.

56. The State's denials of Briggs' application for a development permit and exclusions were, and each of them was, pursuant to a policy to preserve the subject property in its then undeveloped status pending its acquisitions.

Dated: June 24, 1977

RALPH M. DRUMMOND

Judge of the Superior Court

Appendix F

CONCLUSIONS OF LAW

Superior Court of the State of California
for the County of Monterey

NO. 71974

Mitzi S. Briggs,
Plaintiff,
vs.
State of California, acting by and through the Department of Parks and Recreation, et al.,
Defendants.

[Filed June 27, 1977]

1. On March 27, 1975, the State of California caused and accomplished a de facto taking of the subject property entitling Briggs to judgment in inverse condemnation for said taking, and to (1) just compensation for said taking as measured by the fair market value of the subject property as of March 27, 1975, for its highest and best use, and (2) for interest thereon at the prevailing fair market rate from said date of taking until paid. The determination of fair market value as of that date properly includes consideration of the existence and permit requirements of the California Coastal Zone Conservation Act of 1972, but ignoring Briggs' permit applications to the Regional and Coastal Commissions and the denial of those applications; and further ignoring any interest of the State of California

in acquiring said property; and further ignoring any interest by the Regional or State Coastal Commission in recommending the subject property for acquisition.

2. On and after August 8, 1973, the State of California interfered with and blocked Briggs use, development and economic return on the subject property entitling Briggs to judgment in inverse condemnation (1) for damages incurred by Briggs during the period beginning August 8, 1973, to the date of taking, March 27, 1975, and (2) for interest thereon at the prevailing fair market rate from the date of said taking (March 27, 1975) until paid.

Dated: June 24, 1977

RALPH M. DRUMMOND

Judge of the Superior Court

CERTIFICATE OF MAILING

I do hereby certify that I am not a party to the within stated cause, and that on June 27, 1977, I deposited true and correct copies of attached document, each in sealed envelopes with postage thereon fully prepaid, in the mail at Salinas, California, directed to each of the following named persons at their respective addresses, as hereinafter set forth:

Leonard M. Sperry, Jr., Esq.
Deputy Attorney General
Department of Justice
6000 State Building
San Francisco, CA 94102

Jess Jackson, Esq.
Attorney at Law
180 Park Road
Burlingame, CA 94010

Dated: June 27, 1977

ERNEST A. MAGGINI, County Clerk and Clerk of the Superior Court for the County of Monterey.

By /s/ Beverly Clausen
Deputy

SELECTED SECTIONS OF CALIFORNIA GOVERNMENT CODE

Appendix G

§ 15850—This part may be cited as the Property Acquisition Law.

§ 15851—As used in this part, "board" means the State Public Works Board.

§ 15852—The State Public Works Board has all the duties, powers, purposes, responsibilities, and jurisdiction of the Property Acquisition Board and whenever by law a duty or jurisdiction is imposed or authority conferred upon the Property Acquisition Board or upon any of its officers or employees such duty, jurisdiction, and authority are vested in the State Public Works Board with the same force and effect as if the title of the State Public Works Board had been specifically set forth therein.

§ 15853—The board shall select and acquire, in the name and on behalf of the State, suitable and adequate real property for such purposes as may be specified in the legislation making funds available for such acquisition. Where moneys are appropriated by the budget act for any fiscal year or by any other act for the acquisition of land or other real property, subject to the provisions of the Property Acquisition Law, such moneys and acquisitions shall be subject to the provisions of this part and said moneys shall be expended in accordance herewith, notwithstanding any other provisions of law.

The board may acquire any interest in real property pursuant to this part which it deems advisable.

The board may acquire furnishings which the owner thereof agrees to sell and which are contained within improvements acquired by the board. Cost of acquisition of such furnishings shall be charged to the appropriation available for acquisition of the real property.

§ 15854—Property shall be acquired pursuant to this part by condemnation in the manner provided for in Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure, and all money paid from any appropriation made pursuant to this part shall be expended only in accordance with a judgment in condemnation or with a verdict of the jury or determination by the trial court fixing the amount of compensation to be paid. This requirement shall not apply to any of the following:

(a) Any acquisitions from the federal government or its agencies.

(b) Any acquisitions from the University of California or other state agencies.

(c) The acquisitions of parcels of property, or lesser estates or interests therein, for less than five thousand dollars ($5,000), unless part of an area made up of more than one parcel which in total would cost more than five thousand dollars ($5,000) which the board by resolution exempts from this requirement.

(d) Any acquisition as to which the owner and the state have agreed to the price and the State Public Works Board by unanimous vote determines that such price is fair and reasonable and acquisition by condemnation is not necessary.

(e) Any acquisition as to which the owner and the State Public Works Board have agreed to arbitrate

the amount of the compensation to be paid in accordance with Chapter 3 (commencing with Section 1273.01) of Title 7 of Part 3 of the Code of Civil Procedure.

§ 15854.1—The board shall not select or acquire a site for the use of the California State University and Colleges unless, prior to the selection, the trustees have, by resolution, approved of the selection of the site.

§ 15854.5—To promote the safety of students, comprehensive community planning, and greater educational usefulness of state college sites, the Trustees of the California State University and Colleges, before the board acquires title to property for any such site, shall undertake the following action:

Immediately after receiving notice of the proposed acquisition of property which is within two miles, measured by air line, of that point on an airport boundary which is nearest the site, the Trustees of the California State University and Colleges shall notify the Department of Aeronautics, in writing, of the proposed acquisition. The Department of Aeronautics shall make an investigation and report to the trustees within 25 days after receipt of the notice. If the Department of Aeronautics is no longer in operation, the trustees shall, in lieu of notifying the commission, notify the Federal Aviation Agency or any other appropriate agency, in writing, of the proposed acquisition for the purpose of obtaining from the authority or other agency such information or assistance as it may desire to give.

The Trustees of the California State University and Colleges shall investigate the proposed site and within 30 days after receipt of the notice shall submit to the board a written report and its recommendations concerning acquisition of the site. The board shall not acquire title to the property until the report of the trustees has been received. If the report does not favor the acquisition of the property for a state university or college site or an addition to a state university or college site, the board shall not acquire title to the property until 30 days after the trustees' report is received and until the trustees' report has been read at a public hearing duly called after 10 days' notice published once in a newspaper of general circulation within the county in which the property is located.

§ 15855—Before commencing condemnation proceedings the board shall adopt a resolution declaring that public interest and necessity requires the acquisition, construction, or completion by the State of the improvements for which the real property or interest therein is required and that the real property or interest therein described in the resolution is necessary for the improvement.

The resolution of the board shall be conclusive evidence:

(a) Of the public necessity of the proposed public improvement.

(b) That the real property or interest therein is necessary for the improvement.

(c) That the improvement is planned or located in a manner which will be compatible with the greatest public good and the least private injury.

§ 15856—In any condemnation proceeding brought for the acquisition of real property pursuant to this part, the use for which the property is condemned shall be deemed a public use more necessary than any other public use to which the property is devoted at the time the action is commenced.

§ 15857—The board may agree with the owner of part or all of the property to be condemned as to the compensation to be paid, and may incorporate such agreement in a stipulation to be filed in the condemnation proceeding.

§ 15858—Whenever property which is devoted to or held for some other public use for which the power of eminent domain may be exercised is taken for state purposes pursuant to this part, with the consent of the person or agency in charge of such other public use, the board may condemn other real property and exchange it with such other person or agency for the real property to be taken for state purposes.

Transfer of the property so acquired shall be made in accordance with the stipulation entered into pursuant to Section 15857.

§ 15859—The board may abandon any condemnation proceeding. Nothing in this part extends the time specified in Section 1255a of the Code of Civil Procedure for the abandonment of condemnation proceedings.

§ 15860—Any appropriation for the acquisition of real property pursuant to this part may be expended for the payment of all costs and expenses, including the cost of investigation and surveys, the fees and expenses of

appraisers and expert witnesses, and the cost of title searches necessarily incurred in the examination, and the determination of the suitability of any real property to be acquired or under consideration for acquisition, or necessarily incurred in the course of acquisition of any such real property. Claims for such costs and expenses shall be presented by the Director of General Services and shall be paid by the Controller.

§ 15861—Whenever it appears to the satisfaction of the board that any part of the campus of a state college acquired as a site for student housing will, if used for such purpose, interfere with the proper and orderly development of the campus, the board may authorize the use of such site for any other purpose of the state college upon the Trustees of the California State Colleges designating some other part of the campus as a site for the student housing affected.

§ 15862—When real property is acquired by the state pursuant to this part, and until such property is needed for the purpose for which acquired, the jurisdiction over such property is in the Department of General Services. The Director of General Services may transfer jurisdiction of said property to the agency for whose use it was acquired before it is needed for the purpose for which acquired if in his opinion such transfer is in the best interests of the state. The department may lease all or any portion of the property which is not presently needed on such terms and conditions as the director may fix and may maintain, improve, and care for such property in order to secure rent therefrom. The department may remove or demolish buildings or other structures on the property

when it is desirable to do so. It may sell or dispose of the improvements or any materials available upon the demolishing of any building or structure on the property.

§ 15863—The proceeds of such sale shall be deposited in the General Fund. Rentals received by the department, pursuant to Section 15862 shall be deposited in the General Fund and are appropriated to the Department of General Services to maintain, improve, and care for real property acquired pursuant to this part pending the use of such property to further the postwar construction program. Any unneeded balance in the appropriation shall be transferred by the Controller on order of the Director of General Services to the General Fund.

§ 15864—On behalf of the board, the Director of General Services shall file against any appropriation made for expenditure under this part all claims covering expenditures incurred in acquiring real property pursuant to the act by which the appropriation is made, and the Controller shall draw his warrant therefor.

§ 15865—Whenever the board finds that any portion of the funds in any appropriation for the acquisition of real property under this part is unneeded for the acquisition of the site for which such appropriation was made the State Board of Control may, upon the recommendation of the board, authorize the transfer of such unneeded funds to any other appropriation for the acquisition of real property made for expenditure under this part and in augmentation of such other appropriation, except that no part of any appropriation made for expenditure pursuant to this part for the acquisition of a site for the use of an institution, college, school, or other agency within a state

department, shall be transferred to an appropriation for the acquisition of a site for the use of an institution, college, school, or other agency within another state department. For the purposes of this section appropriations for sites for state office buildings, state garages, state warehouses, and official residences are for the use of the Department of General Services.

§ 15866—Without at the time furnishing vouchers and itemized statements, the board may withdraw from any appropriation made for expenditure under this part such sum as may be approved by the Board of Control for use as a revolving fund where payment of compensation or cash advances are necessary.